Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOSEPH F. HUTCHISON, ET AL.,
Petitioners,

v.

FIFTH THIRD BANCORP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 4, 2007

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QUESTION PRESENTED

Under what circumstances, if any, are the provisions of a merger contract concerning the disposition of an ERISA plan by the successor company in the merger enforceable under state law? Petitioners contend that this issue should be addressed by analyzing the capacities in which the parties acted, or failed to act, in relation to the state law claim at issue. Although the Sixth Circuit Court of Appeals refused to consider the parties' respective capacities in relation to Respondent's breach of the merger contract at issue, a majority of the Circuit Courts have endorsed such an approach in resolving ERISA preemption issues.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: Joseph F. Hutchison, John A. Buchheid, Randall Fields, Paul Neiser, Mark Brandon, Robert Zihlman, Karen Hack, Mary L. Medicott, Mary Rengers, Vonda Zimmerman, Audrey Howard, Janet Mueller, Winifred Jansing, Bonnie Cahill, Violet Gay, Betty Rensing and Pamela Karaus.

Defendant-Appellee and Respondent: Fifth Third Bancorp.

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PETITION FOR A WRIT OF CERTIORARI

Joseph F. Hutchison, John A. Buchheid, Randall Fields, Paul Neiser, Mark Brandon, Robert Zihlman, Karen Hack, Mary L. Medicott, Mary Rengers, Vonda Zimmerman, Audrey Howard, Janet Mueller, Winifred Jansing, Bonnie Cahill, Violet Gay, Betty Rensing and Pamela Karaus respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated November 30, 2006, is officially reported at 469 F.3d 583, and is reproduced at App. B, 3a-18a.

The Memorandum Opinion and Order of the U.S. District Court for the Southern District of Ohio, Western Division, dated October 5, 2005, is reproduced at App. C,19a-25a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on November 30, 2006; Petitioners' Petition for Rehearing was denied on January 4, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the denial of Petitioners' Petition for Rehearing. The Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. §§ 1132 and 1144(a) of the Employee Retirement Security Act, 29 U.S.C. § 1001 et. seq. ("ERISA"). The relevant statutory provisions are reproduced at App. F, 51a.

STATEMENT OF THE CASE

Petitioners represent a class of 67 former employees of Suburban Federal Savings Bank ("Suburban"), which Respondent, Fifth Third Bancorp ("Fifth Third"), acquired in a 1997 stock exchange merger. Four years prior to the merger, Suburban had established an Employee Stock Ownership Plan ("ESOP") as a retirement plan for its employees. Each of the 67 class members was a participant in the ESOP at the time of the merger when Fifth Third exchanged shares of its stock for all of Suburban's outstanding shares, including those undistributed shares still remaining in the ESOP's suspense account.[1]

Federal tax code limitations on allocations of suspense account shares to employee participants prevented termination of the plan prior to the merger. *See* 26 U.S.C. § 415. As a result, the ESOP was a continuing Suburban asset which passed to Fifth Third in the merger, with Fifth Third then

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[1] This was a leveraged ESOP in which shares of Suburban stock (and subsequently shares of Fifth Third stock) served as collateral for the ESOP's loan which the employer over time retired with periodic contributions to the ESOP. Since Fifth Third made no contributions to the ESOP either before or after the merger, the ESOP assets were paid for by Suburban alone and not at all by Fifth Third. For a generic description of a leveraged ESOP, *see* the illustration at 26 C.F.R. § 54.4975-7(b)(8)(iv).

assuming the role as successor plan sponsor, administrator and trustee. The merger contract between Suburban and Fifth Third, which the parties denominated the Affiliation Agreement ("Agreement"), explicitly set out the parties' intent that the ESOP would, through its termination, remain exclusively for the benefit of the 67 Suburban employee participants. A copy of the relevant language from the Agreement is reproduced at Appendix E.

Nonetheless, recognizing the limits which the tax code imposed on a timely termination of the ESOP, the parties also stipulated in the Agreement that Fifth Third could, in its sole discretion, transfer the ESOP's remaining assets to its own Fifth Third benefit plan by paying the value of these assets to the 67 former Suburban employee participants. The Agreement also provided that Fifth Third would make such payment "out of its corporate assets and not plan assets." To make these provisions enforceable, the Agreement provided that the Suburban participants were intended third party beneficiaries of the ESOP provisions in the merger contract.

In May 1999, Fifth Third did make such a transfer by amending the ESOP to exclude the former Suburban participants, replacing them with non-Suburban Fifth Third employees as part of Fifth Third's employee retention program, and simultaneously terminating the Suburban ESOP. The value of the ESOP assets (shares of Fifth Third stock) at that time was $467,000. After making demand upon Fifth Third to pay this amount to the former Suburban participants out of its corporate assets, which Fifth Third refused to do, Petitioners filed suit in state court alleging various state law

claims, including breach of the merger contract.[2] A copy of the state law complaint is reproduced at Appendix D.

After Fifth Third removed the lawsuit to federal court, the U.S. District Court asserted federal court jurisdiction over the breach of contract claim on the basis of complete preemption under § 502(a) of the Employee Retirement Income Security Act ("ERISA"), 26 U.S.C. § 1132(a). Thereafter, in response to Fifth Third's motion to dismiss, the District Court held that Petitioners' breach of contract claim was subject to conflict preemption under § 514(a) of ERISA, 26 U.S.C. § 1144(a). In response to the dismissal of their breach of contract claim, Petitioners then amended their Complaint to challenge Fifth Third's plan amendment as an ERISA violation and thereafter commenced pre-trial discovery.

At the conclusion of discovery, Petitioners requested that the District Court reconsider its preemption order dismissing their breach of contract claim. Petitioners at that time also advised the District Court that, unless it found that Fifth Third was acting in a fiduciary capacity in refusing to abide by the terms of the Agreement, Petitioners were abandoning their ERISA claim. The District Court found that Fifth Third was not performing a fiduciary function in this regard. It therefore dismissed the ERISA claim as a matter of law, but declined to reinstate Petitioners' breach of contract claim on the ground that this state law claim implicated relations between traditional ERISA plan entities and, as such, this

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[2] In the alternative, Petitioners alleged that the court could construe the provisions in the Agreement relating to the ESOP as a resulting trust governed by ERISA if the court concluded that Fifth Third breached a fiduciary duty owing to Petitioners. Eventually, in the subsequent District Court proceedings, Petitioners abandoned this ERISA claim.

claim was subject to preemption under 26 U.S.C. §1144(a), ERISA's conflict preemption provision. A copy of the District Court's Order and Opinion are reproduced in Appendix C.

Ultimately, the Sixth Circuit Court of Appeals affirmed the District Court's preemption ruling, concluding that Fifth Third's amendment of the ESOP constituted an essential element of Petitioners' breach of contract claim and that therefore, citing *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), the Agreement did not give rise to any duty which was independent of ERISA or the terms of the ESOP. *Hutchison v. Fifth Third Bancorp*, 469 F.3d 583, 588 (6th Cir. 2006). The Sixth Circuit also held that Fifth Third is a plan fiduciary and Petitioners are challenging a fiduciary's plan amendment. *Id.* at 590.

In a Petition for Panel Rehearing, filed pursuant to FRAP 40, Petitioners urged the Sixth Circuit to join the majority of other Circuit Courts by analyzing ERISA preemption using the "dual capacity" doctrine. Under this approach, Petitioners argued, in refusing to pay them the value of plan assets as required by the Agreement, Fifth Third was not acting in the capacity of a plan sponsor or fiduciary, but rather in the capacity of an arm's length party to a merger contract. Likewise, Petitioners argued, they were not asserting their claim to contract damages in the capacity of ESOP participants (which they in fact no longer were), but in their capacity as intended third party beneficiaries of the

Agreement.[3] On January 4, 2007, the Sixth Circuit issued an order denying without opinion the rehearing petition.

REASONS FOR GRANTING THE PETITION

In resolving conflict preemption issues under ERISA § 514(a), many of the Circuit Courts have employed the dual capacity doctrine, focusing on the exact capacities in which the parties acted (or failed to act) in relation to the state law claim at issue. In a merger contract case, the appropriate inquiry under this doctrine would be whether, in relation to a claim that the merger contract was breached, plaintiff and/or defendant were acting in the capacity of parties to the contract or, on the other hand, were acting in the capacities of plan participant and successor plan sponsor, administrator or trustee. This Court has never explicitly endorsed this doctrine for resolving § 514(a) conflict preemption claims in the context of a merger contract or any other context.[4]

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[3] Petitioners had put forward these same contentions, based on dual capacity case law, in their main and rebuttal briefs to the Sixth Circuit. However, the Sixth Circuit chose not to address the dual capacity doctrine, though informed by Petitioners that the Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits relied on this doctrine to resolve preemption issues.

[4] In *Pegram v. Herdrich*, 530 U.S. 211 (2000), this Court provided some support for the dual capacity approach by recognizing that the ERISA statute itself envisions that plan fiduciaries may act in a non-fiduciary capacity when performing certain functions. *Id.* at 225-26. Although *Pegram* is not an ERISA preemption case, Petitioners urge this Court to extend *Pegram's* rationale to preemption cases in which the parties arguably acted in a non-plan capacity in relation to the claim at issue.

In complete preemption cases under § 502(a), ERISA's civil enforcement section, a similar inquiry stems from the very language used:

> A civil action may be brought - (1) by a participant or beneficiary - . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B). Thus the complete preemption provision itself directs the court to consider whether the claim is being asserted by a plan participant against a person or entity which purportedly owes plan benefits. Under § 514(a), however, only judicial gloss rather than the words of this provision would direct an analysis toward what capacity each party is acting in relative to the particular claim at issue. For this reason, Petitioners are asking the Court to explicitly adopt the dual capacity doctrine for resolving ERISA conflict preemption issues.

I. THE SIXTH CIRCUIT'S REFUSAL TO EMPLOY THE DUAL CAPACITY DOCTRINE IN THIS BREACH OF CONTRACT CASE IS OUT OF STEP WITH THE MAJORITY OF CIRCUIT COURTS.

A. In A Merger Case Involving The Successor Company's Actions With Regard To An ESOP, The Ninth Circuit Relied On The Dual Capacity Doctrine To Avoid ERISA Preemption Of Various State Law Claims, Including A Breach Of Contract Claim.

More than half the Circuit Courts have used the dual capacity doctrine to resolve ERISA preemption issues.[5] In *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811 (9th Cir. 2001), *cert. denied*, 535 U.S. 1015 (2002), the Ninth Circuit held that a state law claim based on the breach of a trust indenture related to an ESOP, was not subject to complete preemption under § 502(a). *Id.* at 820-23. The opinion noted that 44 of the plaintiffs in that case were actually participants in the ESOP, yet their claims were no different than the claims of other former shareholders and current note holders who were never plan participants. *Id.* at 817 and 822. Relying upon *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), the Court concluded that "any

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[5] Since this Court's opinion in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), in which the Court held that preemption issues must be resolved primarily in light of Congress's objectives in enacting ERISA, rather than by a literal construction of the "relate to" language of § 514(a), all of the Circuit Courts employing the dual capacity analysis have explicitly done so in a manner that comports with Congress's objectives as identified in *Travelers*.

duties owed by the plan to the ESOP participant Plaintiffs are also parallel (as in *Sommers*) but independent to those owed to them as note holders." *Abraham*, *supra*, at 822. The Court also noted: "Although some Plaintiffs were also ESOP participants and Norcal employees, their claims were brought solely in their capacity as former shareholders and current creditors." *Id.* at 823.

Likewise, in the case at hand, although Petitioners are former employees of Suburban and some became Fifth Third employees following the merger, and all of them were former participants in the ESOP, their breach of contract claim does not arise from these relationships to the ESOP. Rather, they are asserting this state law claim in their capacity as intended third party beneficiaries of the Agreement. Also, they are asserting this claim against Fifth Third in its capacity as an arm's length party to a merger contract, not in its relationship to the ESOP.

In sum, on facts which are strikingly similar, the Sixth and Ninth Circuits reached diametrically opposite results, accounted for by the Ninth Circuit's use of the dual capacity doctrine as initially formulated by the Fifth Circuit in *Sommers*. The role of *Sommers* in the development of ERISA preemption law has been described as follows:

> The emphasis on these traditional ERISA relationships, also described as the 'ERISA quartet' as a touchstone for preemption, was developed initially in *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 1089 (1987).

H. Shapiro, R. Thorne and E. Harold, *ERISA Preemption: To Infinity and Beyond and Back Again? (A Historical Review of*

Supreme Court Jurisprudence), 58 La. L. Rev. 997, 1030 n.252 (1998).

B. Since The Fifth Circuit's Seminal Opinion In *Sommers*, The Majority Of Circuit Courts Analyze The Parties' Capacities In Relation To The Claim Being Asserted To Resolve ERISA Preemption Issues.

Recently, in *Bank of Louisiana v. Aetna U.S. Healthcare, Inc.*, 468 F.3d 237 (5th Cir. 2006), relying on its earlier opinion in *Sommers*, the Fifth Circuit held that ERISA did not preempt a breach of contract claim against the plan administrator because it was not acting in a fiduciary capacity in negotiating a stop-loss insurance contract or in performing its duties under this contract. *Id.* at 243-44. Likewise, Fifth Third was not acting in a fiduciary capacity in amending the ESOP. "Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). In refusing to pay Petitioners the value of plan assets transferred from the ESOP (which Suburban had paid for by its contributions to the plan), Fifth Third's liability stems from its role as an arm's-length party to the merger contract with Suburban.

In *Cotton v. Massachusetts Mutual Life Ins. Co.*, 402 F.3d 1267 (11th Cir. 2005), the Eleventh Circuit declined to resolve the preemption issue merely by considering the parties' status as ERISA entities:

> And when an insurer is not acting in its capacity as an ERISA entity, we can see no reason that Congress would have sought to immunize it from liability for fraud or similar state-law torts.

Id. at 1284. In *Wilson v. Zoellner*, 114 F.3d 713 (8th Cir. 1997), the Eighth Circuit rejected a mechanical status approach:

> Because Prudential is a fiduciary of the Prudential policy with Midway, Zoellner apparently argues that allowing Wilson to recover against Zoellner would affect a fiduciary's relation to a beneficiary, and should therefore be preempted. We reject this argument.

Id. at 718 ("Because Prudential does not face any liability incurred by its role as an ERISA entity, its relationship with other ERISA entities cannot be affected by Wilson's suit.").

The dual capacities approach was also adopted in *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266 (3rd Cir. 2001), where the Third Circuit held that ERISA preemption attaches to an HMO's administrative functions but not to its medical services functions. "In both cases, we recognized that the HMO had assumed the dual role of an administrator of benefits and a provider of medical services." *Id.* at 274. "As these defendants (a physician group) disclaim any administrative authority or responsibility with respect to the plan, it follows that the preemption afforded by § 514(a) for claims 'relating to' a plan is inapplicable." *Id.* at 280. The Third Circuit used the dual capacity analysis both in relation to complete preemption under § 502(a) and express preemption under § 514(a).

In *Darcangelo v. Verizon*, 292 F.3d 181 (4th Cir. 2002), the Court held that the ERISA plan administrator was not acting in its administrative capacity in obtaining a plan participant's medical records to assist in opposing an employment discrimination claim. *Id.* at 192-94. "The clear

implication of these allegations is that CORE was not performing a fiduciary function, but was simply behaving as a rogue administrator, acting entirely outside the scope of its duties under the plan." *Id.* at 193. The Court also noted that its preemption ruling based upon the defendant's capacity in relation to the claim was consistent with the "objectives" analysis adopted by this Court in *Travelers*. *Id.* at 194. See also *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1471 (4th Cir. 1996).

II. THE DUAL CAPACITY APPROACH TO RESOLVING PREEMPTION ISSUES IS CONSISTENT WITH, BUT ADDS ADDITIONAL CONTENT AND CLARIFICATION TO, THE SUPREME COURT'S RECENT PREEMPTION CASE LAW.

A. The "Independent Source Of Duty" Formulation In *Davila* Does Not Address The Commonplace Occurrence of Merger Contracts Dealing With The Disposition Of ERISA Benefit Plans.

In *Aetna Health Inc. v. Davila,* 542 U.S. 200 (2004), this Court held that claims for negligence brought under the Texas Health Care Liability Act ("THCLA") were subject to complete preemption under ERISA § 502(a) because the duty of care imposed by that statute does "not arise independently of ERISA or the plan terms." *Id.* at 212. To the contrary, only an erroneous interpretation of the plan would create THCLA liability. *Id.* This Court therefore rejected the argument that the statutory duty of care constituted an independent legal duty under *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1981), dealing with individual employees' contracts which predated the collective bargaining agreement governed by the Labor Management Relations Act

("LMRA").[6] A THCLA claim must be based on a faulty plan interpretation, whereas the collective bargaining agreement in *Williams* was a non-issue.

Neither *Williams,* which held that the state law breach of contract claim was not subject to LMRA preemption, nor *Davila,* which held that the alleged state law violation claim was preempted, addressed the precise issue at hand, where the state law claim is based on the breach of a merger contract dealing with the disposition of ERISA plan assets. In *Williams,* the employees' individual contracts did not in any way connect with the collective bargaining agreement governed by LMRA. 482 U.S. at 395. In *Davila*, the plan administrator had to make an erroneous coverage decision to incur liability under the Texas statute. 542 U.S. at 213. By contrast, in the case of a contract dealing with the disposition of ERISA plan assets by the plan sponsor, administrator or trustee, the preemption issue is best resolved by a dual capacity analysis, just as the Ninth Circuit concluded in *Abraham v. Norcal Waste Systems, Inc., supra*, 265 F.3d 811. Without guidance from this Court, the Sixth Circuit failed to recognize the applicability of the dual capacity analysis.

B. In *Pegram,* the Supreme Court laid the groundwork for the general acceptance of a dual capacity approach to resolving preemption issues.

In *Pegram v. Herdrich,* 530 U.S. 211 (2000), the Court refused to recognize a breach of fiduciary claim against an

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[6] Like the ERISA statute, LMRA has been construed to completely preempt certain state law claims. *Avco Corp. v. Machinists,* 390 U.S. 557 (1968).

HMO that offered incentives to its physicians to limit medical treatment. In arriving at this result, the Court elaborated on the well-entrenched ERISA concept that plan fiduciaries certainly may function in non-fiduciary capacities relative to a plan. *Id.* at 220-23. This concept flows directly from the statutory definition of an ERISA fiduciary, which eschews a status approach in favor of a functional description. *Id.* at 221.

Although *Pegram* did not directly address preemption issues, it nevertheless provides a basis for resolving preemption issues related to fiduciaries by use of a dual capacity analysis. Therefore, at least to this extent, Petitioners' advocacy of such an analysis is certainly consistent with the *Pegram* opinion. In fact, most if not all of the dual capacity preemption holdings by Circuit Courts and federal district courts since the *Pegram* decision was issued are based in part upon the explanation in *Pegram* that the common law understanding of a fiduciary is status related and therefore unchanging, whereas the ERISA approach is purely functional and therefore can be determined only in relation to the particular activity in question. This is an approach which is easily transferable to any traditional ERISA plan entity, including plan participants as in the case at hand.

C. Adoption of the dual capacity analysis is a logical extension of this Court's efforts in many ERISA preemption cases to provide the lower courts with guidance in applying the nebulous statutory language.

Although the *Davila* opinion mentioned *Pegram's* dual capacity analysis in passing, it did not incorporate this analysis into its preemption holding. Instead, it merely distinguished *Pegram* as relating only to mixed eligibility and

treatment decisions by HMO physicians. 542 U.S. at 220-21. In the case at hand, Petitioners are seeking to extend the dual capacity analysis to state law breach of contract cases where the contract at issue deals with the disposition of an ERISA plan. Without an explicit adoption of the dual capacity analysis by this Court, the rationale in *Davila* can easily be misapplied, as in the case at hand.

Relying upon *Davila,* the Sixth Circuit properly noted that a claim for damages, as distinct from plan benefits, may be preempted where a plan benefit determination is an element of the state law claim. *Hutchison,* 469 F.3d at 588. The Sixth Circuit also concluded based upon *Davila* that "Fifth Third is an ERISA plan fiduciary and it is Fifth Third's amendment of the plan that is directly challenged, not just implicated, in this suit." *Id.* at 590.[7] In fact, the Sixth Circuit stated: "In contrast, Fifth Third is a fiduciary in this case." *Id.* at 589. Under a dual capacity analysis, however, it is clear that Fifth Third was not acting in the capacity of a fiduciary in amending the plan and that Petitioners are not seeking plan benefits in the capacity of plan participants. To the contrary, since most of the 67 class members were no longer Fifth Third employees at the time of the plan amendment, their only capacity was as third party beneficiaries of the merger contract between Suburban and

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[7] Fifth Third's amendment of the plan no doubt triggered its contractual obligation to pay Petitioners the value of the remaining plan assets "out of its corporate assets." Indeed, Petitioners would not have a contract claim at all if Fifth Third had not amended the plan to replace former Suburban participants with exclusively Fifth Third participants. Nevertheless, Fifth Third did not owe this obligation as plan fiduciary, it did not violate a fiduciary duty in amending the plan, and Petitioners had no right to these damages as plan participants.

Fifth Third. Such an analysis is beyond the scope of *Davila*. Therefore Petitioners are seeking direction from this Court that the lower courts must analyze the parties' capacities in relation to the claim at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April 4, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-4389

[Filed January 4, 1007]

JOSEPH F. HUTCHISON, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
FIFTH-THIRD BANCORP,	)
	)
Defendant.	)
	)

BEFORE: ROGERS and GRIFFIN, Circuit Judges; HOOD, Chief District Judge.*

ORDER

Upon consideration of the petition for rehearing filed by the Appellant,

* The Honorable Joseph M. Hood, united States Chief District Judge for the Eastern District of Kentucky, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-4389

[Filed November 30, 2006]

JOSEPH F. HUTCHISON, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
FIFTH-THIRD BANCORP,	)
	)
Defendant.	)
	)

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.
No. 01-00789.

Before: ROGERS and GRIFFIN, Circuit Judges; HOOD, Chief District Judge.*

* The Honorable Joseph M. Hood, United States Chief District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

ROGERS, Circuit Judge. This complicated case involves a merger agreement in which Fifth Third guaranteed that the participants in Suburban Bancorporation's pre-merger employee benefit plan would receive funds from Fifth Third's general assets if certain conditions were met. Joseph H. Hutchison, suing on behalf of a class of former Suburban employees, claims that Fifth Third promised to abide by the terms of the merger agreement, induced class members to vote their shares in favor of the merger, and then breached its contract by refusing to allocate general funds to class members. Fifth Third argues that the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, preempts Hutchison's state law breach of contract claim because the claim "relates to" the administration of the ERISA benefit plan, and, in the alternative, that Fifth Third did not breach its contract. The district court properly held that ERISA preempts the breach of contract claim and dismissed the claim. We therefore affirm.

In 1997, Suburban Federal Savings Bank and Fifth Third negotiated a merger "Affiliation Agreement" between the two companies. The Affiliation Agreement contained language covering Suburban's Employee Stock Ownership Plan ("ESOP") because the ESOP held shares of Suburban. *See generally* 26 C.F.R. § 54.4975-7(b)(8)(iv). Hutchison and other members of the proposed class were participants in the ESOP. After reading the representations contained in § V.E.(1) of the Affiliation Agreement, class members voted the ESOP's Suburban shares in favor of the merger. The two companies merged in 1997.

Section V.E.(1) of the Affiliation Agreement began by discussing how class members could obtain funds from the

ESOP. The page-and-a-half, single-paragraph section required Suburban to develop a written description and timetable discussing funding, amending, and terminating the ESOP before class members could obtain the plan's funds. Because Suburban and Fifth Third were concerned about the tax implications associated with distributing ESOP funds prematurely, the Affiliation Agreement also required Suburban to obtain from the IRS a determination that the ESOP, as amended, satisfied relevant tax provisions.[1] Class

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[1] The first two sentences of § V.E.(1) read:
Suburban Bancorp shall develop a written description and timetable which shall be provided to and approved by Fifth Third and its counsel, setting forth all actions necessary to: (i) make contributions to the Suburban Bancorp, Inc. Employee Stock Ownership Plan ("ESOP") and/or have the ESOP sell unallocated shares under the ESOP to fully repay the ESOP's existing loan, all in compliance with the applicable requirements of ERISA and the Internal Revenue Code, including Code Section 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048) and 404; (ii) amend the ESOP to authorize the sale of unallocated shares to repay the loan, to provide for the allocation of gain on the sale of unallocated shares in a manner that complies with the position of the IRS in Private Letter Rulings 9648054 and 9426048 and to make such other changes as may be necessary to implement the termination; (iii) terminate the ESOP; and (iv) submit the ESOP to the Internal Revenue Service for a determination letter that the ESOP, as so amended and terminated, continues to be a qualified retirement plan and employee stock ownership plan under Section 401(a) and 4975(e)(7) of the Code. Upon development and approval by Fifth Third of said written description and timetable, Suburban Bancorp shall take such actions as described therein as are approved by Fifth Third.

members could not receive any funds until the IRS made such a determination.[2] Finally, the section provided that "[i]n connection with the . . . resolution of the ESOP, the parties agree they intend that, to the extent not prohibited by applicable law, the ESOP shall be maintained through the date of its final termination for the exclusive benefit of individuals who had become ESOP participants on or before the Effective Time," namely the class members.

Section V.E.(1) then included a contingency plan, the meaning of which is in dispute. It stated that, if the parties agreed in good faith that allocating the ESOP's shares would violate certain IRS provisions, Suburban would apply to the IRS for approval allowing ESOP funds to "either revert to Fifth Third or [be] transferred to an employee benefit plan of Fifth Third."[3] The next sentence reads, "If and only if the IRS

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[2] The third sentence reads:
Distribution of the shares and any other assets of the ESOP shall (I) not occur until after the receipt of the foregoing IRS determination letter and (ii) occur prior to the Effective Time only with the express written consent of Fifth Third, which shall not be unreasonably withheld.

[3] The sixth sentence reads:
If, upon development of the written description and timetable referred to above, the parties agree in good faith that allocation of all or any shares of stock held in the ESOP's suspense account would violate the Code's section 415 limitations as interpreted by the IRS in private letter rulings 9648054 and 9426048, Suburban Bancorp shall apply to the IRS for approval (either through an IRS determination letter or other means reasonably acceptable to Fifth Third) of a transaction (the "Transaction") whereby the excess shares (or cash value thereof) (i.e., those shares remaining after fully utilizing the section 415

approves such a Transaction [for reverting or transferring the funds], or Fifth Third otherwise proceeds with the Transaction without IRS approval," Fifth Third will pay class members "out of its corporate assets and not plan assets" the amount of money in the ESOP at the time of the merger, minus administrative costs.[4]

Suburban began, but did not complete, the steps outlined in Section V.E.(1) to distribute ESOP funds to class members. First, it adopted a Plan Amendment that limited participation in the ESOP to member of the current class. Second, Suburban proposed, and Fifth Third approved, a schedule to accelerate termination of the ESOP. Suburban, however, never obtained the necessary IRS determination letter, and class members, as a result, did not receive ESOP funds.

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limits as interpreted by IRS in private rulings 9648054 and 9426048) either revert to Fifth Third or are transferred to an employee benefit plan of Fifth Third.

[4] The parties dispute the interpretation of this provision. Fifth Third refused to pay class members because it interpreted these two sentences as requiring both (1) a good faith determination about tax implications and (2) either IRS approval or "Fifth Third otherwise" proceeding. Because there was no good faith determination about the tax implications and Suburban did not seek a determination letter from the IRS, Fifth Third argues that the necessary precondition for recovery did not occur. Hutchison, meanwhile, argues that this court should read the "Fifth Third otherwise" clause independently and that class members could recover if (1) the parties have good faith concerns about the tax implications but the IRS approves the plan modifications *or* (2) Fifth Third otherwise reverts or transfers ESOP funds. Because ERISA preempts Hutchison's claim, we do not reach the merits of this dispute.

After the merger, Fifth Third became the successor ESOP sponsor and trustee and took actions to ensure that class members could no longer recover funds from the ESOP. In two separate Plan Amendments, Fifth Third included 1,633 Fifth Third employees in the ESOP and then retroactively excluded class members from the ESOP. In the second Plan Amendment, Fifth Third distributed the ESOP funds to Fifth Third employees, thereby terminating the ESOP. Thus, ESOP funds did not go to class members, whom Fifth Third excluded from the ESOP; instead, the funds went to Fifth Third employees who were not members of the pre-merger Suburban ESOP.

Hutchison brought a civil action in the Ohio Court of Common Pleas on October 29, 2001, raising three types of claims. The first group of state-law claims related to Fifth Third's alleged misrepresentations to class members before they voted in favor of the merger (i.e., claims of breach of contract, intentional misrepresentation, and negligent misrepresentation). The second group of state-law claims related to Fifth Third's alleged taking of class members' assets from the ESOP (i.e., conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing). Finally, Hutchison included an ERISA claim against Fifth Third.

On November 14, 2001, Fifth Third removed the case to the U.S. District Court for the Southern District of Ohio, pursuant to 28 U.S.C. § 1441, because the complaint contained an ERISA claim. Hutchison sought to dismiss the ERISA claim, and moved to remand the case to state court. On August 6, 2002, the district court denied the remand request, finding that ERISA preempted Hutchison's state law claims. The district court then dismissed the state law claims on March 10, 2003, because of ERISA preemption, a decision

that it reaffirmed on October 5, 2005. On April 10, 2003, Hutchison filed an amended complaint, alleging only an ERISA violation. On October 7, 2005, the district court dismissed Hutchison's remaining ERISA claim, finding that Fifth Third did not breach any fiduciary duties owed to class members.

In its August 6, 2002, order, the district court held that ERISA preempted Hutchison's claim because Hutchison "sought plan benefits" and "it will be necessary to consult the plan document in order to make an appropriate distribution of any recovery." Citing *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991), the district court also noted that, as a legal matter, "[t]he scope of ERISA preemption is broad and subsumes virtually any state law claim which relates to an employee benefit plan," including those raised by Hutchison. In its October 5, 2005, order, the district court focused on the relationship between the parties. It noted that "[p]laintiffs are beneficiaries of the ESOP plan and their breach of contract claim is against the employer-both traditional plan entities." Finally, the district court concluded that this court's holding in *PONI* required ERISA preemption only in cases of claims against a non-fiduciary third party. *See Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005) (*PONI*). The district court held that ERISA preempted because Fifth Third, unlike the third party in *PONI*, was a fiduciary.[5]

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[5] Because it held that ERISA preempted Hutchison's state law claims, the district court did not analyze Hutchison's state-law breach of contract claim. The district court did rule that, as a matter of ERISA law, Fifth Third did not "transfer" ESOP funds by adding and removing employees. To reach this conclusion, the district court assumed for the purposes of dismissing the remaining ERISA claim at the summary judgment stage that the Affiliation Agreement became part of the plan.

On October 25, 2006, Hutchison filed his notice of appeal, challenging all four district court orders.[6] On appeal, the parties fundamentally disagree over the nature of the Affiliation Agreement. Hutchison argues that Fifth Third's obligations arose before class members and Fifth Third had a fiduciary-beneficiary relationship and that Fifth Third's actions induced class members to vote in favor of the merger. As a result, Hutchison argues, ERISA does not preempt the breach of contract claim. Fifth Third, on the other hand, describes the nature of the Affiliation Agreement differently. Fifth Third argues that class members could have challenged Fifth Third's Plan Amendment under ERISA and that its legal duty arose under the ESOP. As a result, Fifth Third argues that ERISA preempts Hutchison's claims.

Affirmance is required because plaintiffs seek damages for the ERISA-regulated actions of an ERISA fiduciary, based on an alleged contract that the fiduciary entered into before it

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[6] In his briefs, Hutchison only challenges the dismissal of the state-law breach of contract claim and does not argue that the district court improperly dismissed the claims of intentional misrepresentation, negligent misrepresentation, conversion, unjust enrichment, and breach of covenant of good faith and fair dealing. Similarly, although the notice of appeal includes a challenge to the October 7, 2005, order, Hutchison does not argue on appeal that the district court improperly dismissed the ERISA claim. Rather, Hutchison argues that the district court, in its application of ERISA law, misinterpreted a key provision of the Affiliation Agreement, and that, to the extent that this interpretation is relevant to the class's state-law claims, this court should overturn the district court's order. Because ERISA preempts Hutchison's breach of contract claim, we do not reach the merits of his interpretation of the Affiliation Agreement.

became a fiduciary with respect to plaintiffs. ERISA preempts in that situation because the state-law contract claim would bind fiduciaries to particular choices, thereby functioning as a regulation of the ERISA plan. As discussed in further detail below, this conclusion is supported by the Supreme Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004), and is consistent with case law from this circuit. *See PONI*, 399 F.3d at 698; *Briscoe v. Fine*, 444 F.3d 478, 497 (6th Cir. 2006).

As in *Davila*, ERISA limits plaintiffs' ability to challenge a plan administrator's decision regarding benefits. In *Davila*, plaintiffs relied on a Texas statute that held managed care entities liable for damages "proximately caused" by an entity's failure to "exercise ordinary care when making health care treatment decisions." 542 U.S. at 204 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 88.002(a) (Vernon 2004 Supp.)). The Supreme Court noted that the duties that the Texas statute imposed "do not arise independently of ERISA or the plan terms." *Id.* at 212. If a plan administrator decided correctly that a plan did not cover a particular treatment, "the failure of the plan itself to cover the requested treatment would be the proximate cause" of the harm. *Id.* at 213. Thus, ERISA preempted the state claim because an action exclusively under the control of ERISA law — deciding whether to grant benefits — was a necessary element of the state-law cause of action. In this case, Fifth Third's decision to amend the ERISA plan, making its current employees beneficiaries at the expense of class members, is just as much a subject of ERISA regulations as the benefit determination in *Davila*. Such a determination goes to the heart of what Congress intended ERISA to govern: the rights of beneficiaries under ERISA against plan administrators. Fifth Third's decision to amend the ESOP (a decision clearly "relate[d] to" ERISA, 29 U.S.C. § 1144) constituted an element of Hutchison's state law claim,

and no class member could sue Fifth Third before the decision to exclude him or her from the ESOP. There is, therefore, no basis for distinguishing in terms of ERISA preemption the actions that class members challenge here from those plaintiffs challenged in *Davila*.

As in *Davila*, it does not matter whether plaintiffs cite a different body of law to support their cause of action (state tort or contract law versus ERISA fiduciary responsibility) or whether the relief that plaintiffs seek is different from the relief that ERISA affords (damages for personal injury or breach of contract versus plan benefits under ERISA). As long as ERISA exclusively regulates the activity (deciding whether to award benefits), ERISA prevents the distinct state law tort scheme from superimposing an extra layer of regulation on top of the ERISA-regulated plan benefit determination. Just as the plaintiff in *Davila* sought to use a separate body of law-state tort law-to govern the plan determination at issue there, the plaintiffs in this case seek to use a separate body of law-state contract law-to govern the plan amendments at issue here.

We recognize that there are differences between the claim in this case and the claim in *Davila*. In the present case, but not in *Davila*, some of the elements of the state law cause of action came into existence before there was an ERISA-governed relationship between the fiduciary and the beneficiaries. Here, Fifth Third entered into the contract that is the basis for the state law claim before Fifth Third became the administrator of the ESOP. Nevertheless, a key element of the state law claim-albeit one that arose later -- was the ERISA-governed action of Fifth Third in changing the beneficiary scheme. For this reason, the timing of the obligations is a fact insufficient to distinguish this case from *Davila*.

Not permitting extra-ERISA regulation to restrict a fiduciary's ERISA-related decisions (whether the regulation creates obligations before or after the fiduciary's ERISA obligations arise) is consistent with the purposes that Congress had in mind when it passed ERISA. As the Supreme Court noted in *Davila*, "Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sections, and ready access to the Federal courts.'" 542 U.S. at 208 (quoting 29 U.S.C. § 1001(b)). Congress engaged in a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.* at 215 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)). Those purposes apply just as strongly when the additional regulation under state law arises, in part, from actions preceding the onset of the ERISA-governed relationship between the parties. Allowing Hutchison's state-law claim to proceed could have an impact on this careful balancing because the plan administrator would have to evaluate beneficiaries' state-law claims before making decisions relating to the ERISA plans, and a threat of litigation from beneficiaries might discourage plan administrators from making decisions that are permissible under ERISA. In addition, allowing Hutchison's state-law claim to proceed might discourage the creation of employee benefit plans in the future. Administrators would require specialized knowledge of ERISA provisions *and* various state laws, at an additional cost to employers. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) ("Uniformity is impossible, however, if plans are subject to different legal obligations in different States.").

Moreover, ERISA preemption in this case is fully consistent with our recent cases. In *PONI*, for instance, we held that ERISA did not preclude an employer's state-law breach of contract and negligent misrepresentation claims against a record keeper of employee life insurance policies. 399 F.3d at 692. The employer alleged that the record keeper allowed benefit plans to violate Internal Revenue Service regulations, resulting in the requirement of additional contributions and the imposition of fines on the employer. We held that ERISA did not preempt the breach of contract claim against the record keeper because the record keeper was not a fiduciary under any of the plans at issue in the case. *Id.* at 700. In contrast, Fifth Third is a fiduciary in this case. In addition, we explained that the state-law cause of action did not fall within any of the three recognized categories for which courts generally find ERISA preemption:

> Specifically, PONI's suit against [the record keeper] will not result in mandating a specific employment benefit structure, providing an alternative enforcement mechanism of an ERISA plan, or regulating an ERISA plan itself. Thus, the sole remaining issue is whether the breach of contract claim would implicate "relations among the traditional ERISA plan entities."

Id. In resolving the last question, we reasoned that

> PONI's claim against [the record keepers] is not "based on any rights under the plan; there is no allegation that any of the plan's terms have been breached. Nor is there any effort to enforce or modify the terms of the plan." [The record keeper] was simply a third-party service provider.

Id. at 701 (citation omitted). The instant case is of course entirely different. Plaintiffs directly challenge a specific employment benefit structure and seek to regulate an ERISA plan in the sense that the Supreme Court contemplated in *Davila*. Most strikingly, the instant case differs from *PONI* in that plaintiffs' claim implicates relations among traditional ERISA plan entities. Fifth Third is an ERISA plan fiduciary and it is Fifth Third's amendment of the plan that is directly challenged, not just implicated, in this suit.

Preemption in this case is also consistent with our post-*Davila* case law. In *Briscoe*, former employees sued, among others, former officers and directors of a bankrupt employer, alleging violation of fiduciary duties under ERISA and various torts under Kentucky law. 444 F.3d at 498. We held that ERISA preempted the state law claims for fraud, misrepresentation, concealment, and failure to disclose the financial condition of the employee benefit plan. In doing so, we followed *Davila* and also our reasoning in *PONI*, finding that the two cases were fully consistent. *Id.* at 499-500. However, we held that ERISA did not preempt the employees' state-law claim that defendants breached a duty that they owed to employees by failing to disclose the overall financial condition of the corporation. Our reasoning in that case simply does not extend to the instant case, because, as we noted in *Briscoe*:

> with respect to the claim that the [former officers and directors of the company] breached a duty by failing to disclose the overall financial condition of the Company, . . . the plaintiffs could have alleged such a breach of duty even if the Company had never sponsored an ERISA-covered plan.

Id. at 500. That is not the case here.

This case is also different from *Briscoe* because class members had an avenue to pursue, and did in fact pursue, a remedy for such wrongs under ERISA. As mentioned above, Hutchison brought an ERISA claim in addition to the class members' state-law claims. The district court dismissed the ERISA claim, and Hutchison does not appeal that decision.[7] ERISA prevents class members from re-casting their ERISA claim as a breach of contract claim by simply rephrasing the source of Fifth Third's obligations. *Davila*, 542 U.S. at 214.

The judgment of the district court is AFFIRMED.

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[7] As a result, the appropriateness of the district court's decision to treat the Affiliation Agreement as if it were an ERISA plan amendment for the purposes of deciding the ERISA claim is not before us on appeal. *Cf. Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360, 375 (5th Cir. 2006).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 05-4389

[Filed November 30, 2006]

JOSEPH F. HUTCHISON, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
FIFTH-THIRD BANCORP,	)
	)
Defendant.	)
	)

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

Before: ROGERS and GRIFFIN, Circuit Judges; HOOD, Chief District Judge.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:01-CV-789

[Filed October 5, 2005]

JOSEPH F. HUTCHISON, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
FIFTH-THIRD BANCORP,	)
	)
Defendant.	)
	)

ORDER

This matter is before the Court on Plaintiff Joseph F. Hutchison, et al.'s motion for reconsideration (Doc. No. 64). For the reasons set forth below, Plaintiff's motion is not well taken and is **DENIED**.

This lawsuit arises out of a merger between Defendant Fifth Third Bancorp ("Fifth Third") and Suburban Banccorporation,Inc. ("Suburban"). In a prior order, the

Court described the factual background of the parties' dispute as follows:

> Plaintiffs' Second Amended Complaint alleges that in 1997, Suburban merged with Fifth Third. Prior to the merger, Suburban and Fifth Third entered into an Affiliation Agreement, which controlled the effect of the merger on the Suburban ESOP. At the time of the merger, the parties were aware that Fifth Third had no plans to continue the Suburban ESOP after the merger. Since some important factors concerning termination of the Suburban ESOP were unknown when the Affiliation Agreement was signed, the Agreement addressed the effect of the merger on the Suburban ESOP. If all of the ESOP shares could be allocated within the Section 415 limits, the ESOP would be terminated on June 30, 1998 and all assets distributed to the ESOP members.
>
> The Affiliation Agreement also anticipated the possibility that the ESOP could not be terminated by the projected date, causing excess shares to remain in the Plan. In that event, the Agreement stated that if Fifth Third either accepted the excess assets or transferred them to a Fifth Third plan, regardless of whether an IRS approval letter was issued, then Fifth Third would distribute the equivalent amount of the excess to the Plaintiffs.
>
> The Suburban ESOP was not terminated as of June 30, 1998. Plaintiffs allege that, rather than distributing the excess assets to them, Fifth Third amended the Suburban ESOP to permit Fifth Third employees to participate in the plan, contrary to the Affiliation Agreement.

Doc. No. 46, at 3-4 (internal footnote and record citations omitted).

Plaintiffs originally filed a complaint against Fifth Third in the Hamilton County, Ohio Court of Common Pleas. The original complaint asserted state law claims against Fifth Third for breach of contract, conversion, intentional misrepresentation, negligent misrepresentation, unjust enrichment, and breach of the covenant of good faith and fair dealing. The complaint also contained a complaint for breach of fiduciary duty pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*. Fifth Third then removed the case to federal court on the basis of Plaintiffs' ERISA claim.

Plaintiffs then purported to dismiss their ERISA claim and moved to remand the case to state court. The Court, however, found that Plaintiffs' remaining state law claims were completely preempted by ERISA. The Court, therefore, denied the motion to remand. *See* Doc. No. 9. Plaintiffs then filed an amended class action complaint (Doc. No. 15) which asserted the same seven claims as the original complaint.

In the interim, Fifth Third filed a motion to dismiss the original complaint. Doc. No. 11. In its motion, Fifth Third argued that Plaintiffs' state law claims were completely preempted by ERISA and that they had abandoned their lone ERISA claim by moving to voluntarily dismiss it. After Plaintiffs filed their amended complaint, Fifth Third moved to dismiss the ERISA claim on the grounds that Plaintiffs had failed to exhaust their administrative remedies. Doc. No. 19.

On March 11, 2003, the Court issued an order (Doc. No. 24) which resolved both of Fifth Third's motions to dismiss.

In that order, the Court agreed that Plaintiffs' state law claims were completely preempted by ERISA for the reasons stated in its order denying the motion to remand. *See id.* at 5-6. The Court, therefore, granted Fifth Third's motion to dismiss Plaintiffs' state law claims. The Court then found that Plaintiffs would not be required to exhaust their administrative remedies on the grounds of futility. The Court, therefore, denied Fifth Third's motion to dismiss Plaintiffs' ERISA claim. *Id.* at 13.

Plaintiffs now move the Court to reconsider that part of its March 11, 2003 order which dismissed their state law breach of contract claim. Doc. No. 64. Plaintiffs argue that a recent decision by the Sixth Circuit Court of Appeals, *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692 (6th Cir. 2005)("*PONI*"), has significantly narrowed the scope of ERISA preemption. Plaintiffs contend that pursuant to this decision, their breach of contract claim is no longer preempted by ERISA. The Court disagrees.

ERISA has traditionally been interpreted broadly to preempt any state law that "relates to" an employee benefit plan. *Cromwell v. Equicor-Equitable HCA Corp.*, 949 F.2d 1272, 1275 (6th Cir. 1991). Thus, in *Cromwell*, the Court stated that ERISA preempts "virtually all" state law claims relating to an employee benefit plan. *Id.* According to the Cromwell Court, the only state law claims not preempted by ERISA were those whose connection to the plan are merely remote, tenuous, or peripheral. *Id.*

In *PONI*, however, the Court stated that recent decisions by the U.S. Supreme Court had narrowed the preemptive scope of ERISA from the broadest reach of its preemption provision. *PONI*, 399 F.3d at 697. Rather, the Court stated, in determining whether a state law claim is preempted by

ERISA, courts must look at the objectives of ERISA to determine which state law claims do not survive preemption. Thus, the Court noted, that ERISA preempts state laws which mandate employee benefit structures or their administration, provide alternative enforcement mechanisms, or bind employers or plan administrators to particular choices or preclude uniform administrative practice. *Id.* Not preempted by ERISA, however, are "traditional state-based laws of general applicability that do not implicate the relations among traditional ERISA plan entities, including the principals, the employer, the plan, the plan fiduciaries, and the beneficiaries." *Id.*

In *PONI*, the employer maintained three different retirement plans a defined benefit pension plan, an ESOP, and a savings plan. The employer hired Miami Valley Pension Corp. ("MVP") to perform record keeping services for its plans, including "top heavy" testing to determine if too great a percentage of the plan's assets were dedicated to key employees. If a plan is top heavy, certain minimum vesting, benefit, and contribution requirements are triggered. MVP, however, performed the top heavy testing incorrectly and as a consequence, the employer failed to comply with its top heavy contribution requirements for a seven year period. The Internal Revenue Service did not disqualify the plans, but fined the employer $5,000. Additionally, the employer was required to make a minimum contribution of $137,087.07 to the plans and incurred an additional $35,000 in service and legal fees bringing the plans back into compliance. *Id.* at 695-96.

The employer sued MVP for breach of its service contract and for negligently misrepresenting its knowledge of the applicable law and ability to operate the plans in conformity with the law and the plan documents. MVP moved to dismiss

the employer's breach of contract claims on the grounds that the claim was completely preempted by ERISA. The Court disagreed, however. The Court noted that MVP was not a fiduciary of any of the plans, but rather was a non-fiduciary service provider. The Court then found that a state law breach of contract claim versus MVP would not mandate any specific benefit structure, provide an alternative enforcement mechanism, or regulate the plan itself. *Id.* Moreover, because MVP was a non-fiduciary, the Court concluded that a breach of contract claim would not implicate the relations among traditional plan entities. *Id.* The Court found that MVP was simply a third party service provider whose services were no different from the consulting, actuarial or legal services provided to ERISA plans that other courts have allowed state law claims to go forward. *Id.* at 701.

In this case, assuming for purposes of the present motion that Plaintiffs' breach of contract claim would not provide an alternative benefit structure, constitute an alternative enforcement mechanism, or regulate the plan itself, the claim is still preempted because it implicates the relations among traditional plan entities. Indeed, in contrast to *PONI*, here Plaintiffs' breach of contract claim involves and implicates the relations of quintessential plan entities - the plan beneficiaries and the employer. *See id.* at 697. *Toledo Blade Newspaper Unions Pen. Plan v. Investment Perf. Serv., LLC*, 373 F. Supp. 2d 735, 747 (N.D.Ohio 2005), is distinguishable for the same reason. Essentially *PONI* stands for the proposition that ERISA does not preempt state law breach of contract claims against third party, non-fiduciary service providers. Since Plaintiffs are beneficiaries of the ESOP plan and their breach of contract claim is against the employer - both traditional plan entities - *PONI* is not applicable to save the claim from preemption.

Accordingly, Plaintiffs' motion for reconsideration is not well-taken and is **DENIED**.

IT IS SO ORDERED

Date October 5, 2005 s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0107565

[Filed October 29, 2001]

JOSEPH F. HUTCHISON, Individually and as a Representative of the Class of Participants in the Suburban Bancorporation, Inc. Employee Stock Ownership Plan
11633 Almahurst Court
Cincinnati, Ohio 45249,

JOHN A. BUCHHEID, Individually and as a Representative of the Class of Participants in Suburban Bancorporation, Inc. Employee Stock Ownership Plan
6205 Lisbon Avenue
Cincinnati, Ohio 45213,

Randall Fields
5701 Farm Fields Drive
Mason, Ohio 45040,

Paul Neiser
12 Blue Rock Court
Alexandria, Kentucky 41001,

Mark Brandon
954 Ashire Court
Loveland, Ohio 45140,

Robert Zihlman
123 Frazer Drive
Middletown, Ohio 45042,

Karen Hack
6186 Jimbet Court
Cincinnati, Ohio 45239,

Mary L. Medlicott
5586 Oakvista Drive
Cincinnati, Ohio 45227,

Mary Rengers
510 Carrington Lane, Apt. #105
Loveland, Ohio 45140,

Vonda Zimmerman
4568 Farview Drive
Cincinnati, Ohio 45247,

Audrey Howard
5453 Asbury Lake Drive, #72
Cincinnati, Ohio 45247,

Janet Mueller
464 McIntosh Drive
Cincinnati, Ohio 45255,

Winifred Jansing)
4429 Duneden Avenue)
Cincinnati, Ohio 45236,)
)
Bonnie Cahill)
3515 Clarkwood Place)
Cincinnati, Ohio 45208,)
)
Violet Gay)
3781 Isabella Avenue)
Cincinnati, Ohio 45209,)
)
Betty Rensing)
3189 Goda Avenue)
Cincinnati, Ohio 45211,)
)
and)
)
Pamela Karaus)
3506 Jessup Road)
Cincinnati, Ohio 45239,)
)
Plaintiffs,)
)
vs.)
)
FIFTH-THIRD BANCORP,)
an Ohio corporation Fifth Third Center)
Cincinnati, Ohio 45202)

Serve Agent for Process:)
Paul L. Reynolds)
38 Fountain Square Plaza)
Cincinnati, Ohio 45263)
)
Defendant.)
)

CLASS ACTION COMPLAINT FOR MONEY DAMAGES WITH JURY DEMAND ENDORSED HEREON

PARTIES AND JURISDICTION

1. Joseph F. Hutchison and John A. Buchheid, individually and as representatives of the class (herein "Plaintiffs") were (a) participants in the Suburban Bancorporation, Inc. Employee Stock Ownership Plan (herein "Suburban ESOP") as of June 30, 1997, (b) employees of Suburban Bancorporation, Inc. (herein "Suburban") as of July 1, 1997, and (c) intended beneficiaries of the affiliation agreement dated March 13, 1997, between Defendant Fifth Third Bancorp and Suburban (herein "Affiliation Agreement").

2. Defendant Fifth Third Bancorp (herein "Fifth Third") is an Ohio corporation licensed to do business in said state. Fifth Third is a signatory to and the promisor in the Affiliation Agreement.

CLASS ACTION ALLEGATIONS

3. This action is brought on behalf of Plaintiffs individually and as a class action pursuant to Ohio Civ. R. 23 on behalf of the class of persons (herein "Class") who were

(a) employees of Suburban during the plan year of the Suburban ESOP that began July 1, 1997, and continued through June 30, 1998 (herein "Plan Year '97"), and (b) participants in the Suburban ESOP as of June 30, 1997.

4. This Class consists of up to one hundred persons within and outside of the State of Ohio, thus making joinder of all members of the Class, whether required or permitted, impracticable. There are questions of law and fact common to the members of the Class that predominate over any questions affecting only individual members including, but not limited to:

a) Whether the Class members were intended beneficiaries of the Affiliation Agreement;

b) Whether the assets held in the Suburban ESOP as of June 30, 1998 (or the equivalent in Fifth Third Corporate assets), were the rightful property of the members of the Class;

c) Whether Fifth Third breached the Affiliation Agreement by failing to distribute, out of corporate assets, monies equivalent to the assets held in the Suburban ESOP (as of June 30, 1998) to the Class members in violation of the Affiliation Agreement;

d) Whether the Affiliation Agreement created a separate, unqualified employee benefit plan for the benefit of the Class members under the Employee Retirement and Income Security Act ("ERISA");

e) Whether the assets held in the Suburban ESOP as of June 30, 1998, were wrongfully converted by Fifth Third

for its own use in violation of the express terms of the Affiliation Agreement;

f) Whether Fifth Third has realized unjust enrichment.

6. The claims asserted by the Plaintiffs are typical of the claims of the members of the Class. In short, the construction and interpretation of the Affiliation Agreement will define the Class members' rights as to assets (or monies from Fifth Third corporate assets equivalent thereto) held by the Suburban ESOP as of June 30, 1998. Each Class member's legal rights will be identical. Their cases will only differ as to the amount of recovery that each Class member is entitled to should judgment be entered against the Defendants.

7. Plaintiffs will fairly and adequately protect the interests of the members of the Class. To that end, Plaintiff has retained attorneys experienced in class action and complex litigation.

8. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

a) it is economically unfeasible for the individual members the Class to fully litigate their individual claims;

b) it would not further judicial economy to litigate each of the individual Class members' claims in separate state court actions because the issues of law and fact are identical except for the amount of recovery each member is entitled to receive;

c) upon resolution of the above described (and other necessary and related) common issues of law and fact, the Court will be able to determine the claims of all members of the Classes;

d) the class action will allow for an orderly and expeditious administration of claims of the Class members and the rights of the various Defendants will be fully and fairly protected, and;

e) the class action will insure the economies of time, effort, expense and the uniformity of decisions.

FACTS COMMON TO ALL CAUSES OF ACTION

EMPLOYEE STOCK OWNERSHIP PLAN

9. On or about September 30, 1993, Suburban established an Employee Stock Ownership Plan for the benefit of its employees (Suburban ESOP). This was a leveraged ESOP, in which the Suburban ESOP borrowed money from Suburban to purchase a certain number of shares of Suburban stock, which were placed in a suspense account as collateral for the loan. Suburban then made contributions to the ESOP which are used to repay the ESOP loan. As the ESOP loan is repaid, shares of stock are proportionately released from the account and allocated among participating employees' accounts.

10. In order to maintain the plan's qualified status, Suburban was limited as to the amount that could be contributed to the Suburban ESOP. In general, contributions are limited to 25% of the salary of participating employees. These limitations are commonly referred to as "Section 415 limitations" because they are contained in Section 415 of ERISA.

11. The limit on contributions to the ESOP limited the amount of the ESOP loan that could be repaid by the ESOP. Consequently, the amount of stock that could be allocated in any given plan year was dependent upon the salary of participating employees.

THE ACQUISITION

12. In early 1997, Suburban and Fifth Third entered into negotiations whereby Fifth Third would acquire Suburban. Several meetings were held between representatives of Fifth Third and representatives of Suburban, including several Class members.

13. Throughout these negotiations, Suburban officials were insistent that assets held by the Suburban ESOP were not assets of Suburban and would remain the property of Suburban employees who had participated in the stock ownership plan.

14. As a result of Suburban officials' concerns, a portion of the negotiations addressed what would happen to the assets held by the Suburban ESOP upon the acquisition of Suburban by Fifth Third.

15. On March 13, 1997, Fifth Third and Suburban completed the negotiations concerning the acquisition and all parties agreed in Section § ____ of the Affiliation Agreement that the assets of the Suburban ESOP would remain for the exclusive benefit of the ESOP participants "Class Members". The Affiliation Agreement is the final and complete writing evidencing the parties' intention with regard to this acquisition, including what would happen to the assets held by the Suburban ESOP. A copy of the Affiliation Agreement is attached hereto as Exhibit A.

16. According to Section V(E) of the Affiliation Agreement, Suburban was instructed to develop a timetable to liquidate the assets of the ESOP in allocations to Employees "Class Members" contributions to the Suburban ESOP by Suburban after the date of the Affiliation Agreement. This provision was included because it was anticipated by the parties that the acquisition may not be completed prior to end of Plan Year '96 (June 30, 1997) and that Suburban employees would still participate in the Suburban ESOP into Plan Year '97 (July 1, 1997 through June 30, 1998). Furthermore, Fifth Third did not intend to continue the Suburban ESOP after consummation of the acquisition.

17. Since several factors were unknown at the time the Affiliation Agreement was signed (including how many Suburban employees would be retained by Fifth Third and when the acquisition would actually close), Section V(E) of the Affiliation Agreement discussed the several possibilities of what might happen as the acquisition was consummated and what effect those events would have on the assets held by the Suburban ESOP at the end of Plan Year '97 (June 30, 1998).

18. According to the Affiliation Agreement, if all the shares of Suburban stock held by the Suburban ESOP could be allocated within the Section 415 limits (not exceed 25% of the participating employees' salaries), then the Suburban ESOP would terminate on June 30, 1998, and the assets or an equivalent value of the assets would be distributed to the members of the Plan "Class Members".

19. The acquisition closed July 27, 1997. As such, the provision within the Affiliation Agreement permitting contributions to the Suburban ESOP according to a timetable was triggered when the Suburban ESOP continued to have participants into Plan Year '97 (*i.e.* after July 1, 1997).

THE SUBURBAN ESOP AND THE AFFILIATION AGREEMENT

20. After the merger was approved by shareholders and regulatory authorities, but prior to closing, counsel for Suburban and counsel for Fifth Third jointly prepared the timetable described in the Affiliation Agreement for participation in the Suburban ESOP by participating employees in Plan Year '97. Fifth Third did not object to this timetable and permitted Suburban employees to continue to participate in the Suburban ESOP. A copy of the timetable is attached to this Complaint as Exhibit B.

21. During the course of Plan Year '97, Fifth Third terminated a significant number of Suburban employees including most upper management employees. Consequently, the available salary base which limited ESOP contributions against which allocations could be made on June 30, 1998, dwindled. In short, the salary base was lowered causing the amount of payment Suburban could make without violating the Section 415 limits to be lowered. Therefore, the number of shares that could be released from the suspense account and allocated to particular employee ESOP accounts without violating the Section 415 limits was reduced.

22. According to Section V(E) of the Affiliation Agreement, both parties anticipated the possibility that the allocations in Plan Year '97 permitted under the timetable could ultimately result in more assets in the plan than could be allocated while complying with the permitted Section 415 limits thereby causing an excess of shares remaining in the Suburban ESOP suspense account. The assets remaining in the Suburban ESOP as of June 30, 1998, that exceeded the permitted allocations under Section 415 of ERISA shall be

called the Excess ESOP Assets for purposes of this Complaint.

23. The parties not only contemplated but also planned for the possibility that allocation of all the plan assets would exceed the permitted limits under ERISA and IRS statutes and regulations, i.e. there would be Excess ESOP Assets.

24. Under Section V(E) of the Affiliation Agreement, if there were Excess ESOP Assets, the Excess ESOP Assets would either revert to Fifth Third or be transferred into a Fifth Third employee benefit plan.

25. During Plan Year '97, Suburban would request a letter ruling from the IRS regarding the transfer of the Excess ESOP Assets. However, the Affiliation Agreement expressly contemplates that Fifth Third could proceed with acquiring the Excess ESOP Assets without any such ruling from the IRS. Consequently, the IRS letter ruling was not a condition precedent to Fifth Third obtaining dominion and control over the Excess ESOP Assets.

26. According to the Affiliation Agreement, if Fifth Third proceeded with either (a) accepting the Excess ESOP Assets in their corporate capacity, or (b) transferred the Excess ESOP Assets into a Fifth Third employee benefit plan, regardless of whether an IRS approval letter was issued, then Fifth Third was obligated to distribute (out of corporate assets) an amount equivalent to the Excess ESOP Assets to all Suburban employees who were (a) employees of Suburban during the plan year of the Suburban ESOP that began July 1, 1997 and continued through June 30, 1998, and (b) participants in the Suburban ESOP as of June 30, 1997, i.e. the Class.

27. Fifth Third was obligated to make the distribution outlined in paragraph 31 of the Affiliation Agreement on a pro rata basis based on each Class member's extent of participation in the Suburban ESOP as of June 30, 1997 (end of Plan Year '96).

28. As of June 30, 1998, and thereafter, Fifth Third had taken control of the Excess ESOP Assets. Upon information and belief, Plaintiffs submit that the Excess ESOP Assets were placed into a Fifth Third employee benefit plan. In particular, the existing Suburban ESOP benefit plan was amended so as to permit Fifth Third employees to participate in the plan thereby creating a Fifth Third employee benefit plan.

29. After June 30, 1999, demand was made of Fifth Third to comply with its-obligation under the Affiliation Agreement to distribute to Class members (out of corporate assets) an amount equivalent to the Excess ESOP Assets.

30. At the writing of this Complaint, Fifth Third has still not distributed to all Class members an amount equal to the Excess ESOP Assets.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT

31. Plaintiffs hereby incorporate paragraphs 1 through 31 as if fully set forth herein.

32. The purpose and intent of Section V(E) of the Affiliation Agreement was to benefit the participants in the Suburban ESOP. Plaintiffs are members of this group of third-party beneficiaries

33. The Affiliation Agreement's anti-third-party beneficiary clause expressly excludes from its application the persons referred to in Section V(E) of the Affiliation Agreement.

34. In consideration of this benefit, the participants in the Suburban ESOP, including Plaintiffs, agreed to vote the shares owned by the ESOP in favor of the Affiliation.

35. Shareholder approval was required for the acquisition to occur.

36. Fifth Third breached its promise to distribute monies equivalent to the Excess ESOP Assets to Class members. In particular, Fifth Third has failed to distribute the Excess ESOP Assets (or the cash equivalent thereof) to Class members after being expressly requested to do so.

37. As a direct and proximate result of this breach of its promise by Fifth Third, Plaintiffs have been damaged as set forth more fully below.

SECOND CAUSE OF ACTION
CONVERSION

38. Plaintiffs hereby incorporate paragraphs 1 through 38 as if fully set forth herein.

39. By using funds that belonged to Class members to fund the Resulting Plan for the benefit of current Fifth Third employees who were strangers to the acquisition transaction, Fifth Third used the property of another (namely Plaintiffs) to fund an employee benefit program, the Resulting Plan, which Fifth Third was obligated to fund under various employment agreements.

40. In short, Fifth Third discharged a corporate debt to the Resulting Plan by using funds belonging to Plaintiffs.

41. Fifth Third funded a corporate debt with the property of Plaintiffs with intent to permanently deprive Plaintiffs of their property.

42. As a direct and proximate result of Fifth Third's use of Plaintiffs' property for Fifth Third's own benefit in funding the Resulting Plan, Plaintiffs have suffered damages as set forth more fully below.

43. Since Fifth Third acted intentionally and with the intent to defraud Plaintiffs of their property by using the Excess ESOP Assets for Fifth Third's own benefit, the Resulting Plan, Plaintiffs are entitled to punitive damages.

THIRD CAUSE OF ACTION
VIOLATION OF ERISA

44. Plaintiffs hereby incorporate paragraphs 1 through 44 as if fully set forth herein.

45. By the terms of the Affiliation Agreement, Fifth Third and Suburban created a new employee benefit plan for the benefit the Class members, namely the Resulting Plan.

46. The plan documents identified the intended beneficiaries of the Resulting Plan as the Class members.

47. The plan documents identified the funding source for the new employee benefit plan. The benefits outlined in the new plan were to be funded by the contributions permitted under the timetable attached as Exhibit B or the cash equivalent thereof.

48. The plan documents identified the procedure for distribution of benefits. The intended beneficiaries were to receive their benefits directly from Fifth Third upon reversion the Excess ESOP Assets to Fifth Third or upon transfer of the Excess ESOP Assets to a Fifth Third employee benefit plan.

49. The terms of the new employee benefit plan stated that Fifth Third would distribute assets equivalent in value to the Excess ESOP Assets in order to avoid any violation of Section 415 limits.

50. Fifth Third was not permitted to exercise any discretion when deciding to distribute the benefits to the Class members, including Plaintiffs. The distribution was mandatory according to the plan documents.

51. By failing to distribute the assets (or the equivalent value thereof) held in the Resulting Plan as required under the plan documents, Fifth Third breached its fiduciary duties to the Class members, including Plaintiffs, insofar as they were intended beneficiaries of the Resulting

52. As a direct and proximate result of Fifth Third's breach of its fiduciary duties, Plaintiffs have suffered damages as more fully set forth below.

FOURTH CAUSE OF ACTION
INTENTIONAL MISREPRESENTATION

53. Plaintiffs hereby incorporate paragraphs 1 through 53 as if fully set forth herein.

54. During the negotiations, representatives of Fifth Third made affirmative representations as to the effect of the yet-to-be executed affiliation agreement on various aspects of

Suburban's business and its employees. Representatives of Fifth Third specifically made representations regarding the effect the affiliation agreement would have on the Suburban ESOP, in particular, that, under the proposed affiliation agreement (which was identical to the Affiliation Agreement ultimately executed by the parties), all the assets contributed to the Suburban ESOP would in fact remain the property of the Class members.

55. In addition, Fifth Third affirmatively represented that under the yet-to-be executed affiliation agreement (which was identical to the Affiliation Agreement ultimately executed by the parties) that all the assets (or there equivalent cash value) held by the Suburban ESOP would be distributed to Class members upon the end of the plan year in which the last contributions to the Suburban ESOP were made.

56. Fifth Third made affirmative representations that under the yet-to-be executed affiliation agreement (which was identical to the Affiliation Agreement ultimately executed by the parties) irrespective of intervening circumstances, once Fifth Third or a Fifth Third benefit plan received the assets from the Suburban ESOP, Fifth Third would distribute money of an equivalent value to the Class members.

57. Fifth Third made these affirmative representations regarding the distribution of all Suburban ESOP assets (or their cash equivalency) to Class members at meetings attended by 59.

58. Plaintiffs and other Class members during the negotiations that occurred during 1997. Plaintiffs and Class members present at these meetings conveyed these representations to other Class members.

59. On the basis of these representations, the Class members, including Plaintiffs, agreed to vote the Suburban ESOP shares of Suburban stock in favor of the proposed acquisition.

60. In a letter dated August 20, 1999 (Attached as Exhibit C), Fifth Third represented that it never agreed to any provision within the Affiliation Agreement that would call for the distribution of monies equivalent to the Excess ESOP Assets to Class members despite the plain language of the Affiliation Agreement and representations of Fifth Third to the contrary. Fifth Third's position is contrary to the representations made during the negotiation meetings that took place during late 1996 and early 1997.

61. During meetings with Class members and in a letter dated November 19, 1999, from counsel for Fifth Third (Attached as Exhibit D), Fifth Third again indicated that the representations previously made by Fifth Third were false. In particular, Fifth Third's attorney claimed that the Affiliation Agreement did require and Fifth Third never intended for the Excess ESOP Assets (or their cash equivalent) to be distributed to the Class members.

62. The foregoing misrepresentations were made intentionally or with reckless disregard for the truth.

63. Fifth Third made these misrepresentations with the intent to mislead the Class members, including Plaintiffs, and induce them into approving the proposed acquisition of Suburban by Fifth Third.

64. As a direct and proximate result of their reliance on these misrepresentations, Plaintiffs have suffered damages as more fully set forth below.

FIFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

65. Plaintiffs hereby incorporate paragraphs 1 through 66 as if fully set forth herein.

66. Representatives of Fifth Third made the misrepresentations described in preceding paragraphs in the context of a commercial transaction in which Fifth Third had a pecuniary interest.

67. Representatives of Fifth Third failed to exercise reasonable care in determining the accuracy and veracity of the representations described in paragraphs 62 through 67.

68. The Class members, including Plaintiffs, relied upon the materially false representations described in preceding paragraphs in conducting their business affairs, to wit: the acquisition transaction and whether to vote the ESOP shares in favor of the acquisition.

69. As a direct and proximate result of the negligent misrepresentations made by Fifth Third, Plaintiffs suffered damages as set more fully forth below.

SIXTH CAUSE OF ACTION
UNJUST ENRICHMENT

70. Plaintiffs hereby incorporate paragraphs 1 through 71 as if fully set forth herein.

71. The Class members, including Plaintiffs, reasonably relied upon the affirmative representations made by Fifth Third in deciding to vote the Suburban stock held by

the Suburban ESOP in favor of the proposed acquisition of Suburban by Fifth Third.

72. In the Affiliation Agreement, Fifth Third did not intend to acquire and did not agree to pay for the Exce ; ESOP Assets.

73. As a direct and proximate result of the approval of the acquisition, Fifth Third was benefited by receiving assets for which Fifth Third did not pay and with which it could (and did) discharge a corporate debt to other employee benefit plans as outlined in Plaintiffs' Second Cause of Action.

74. The Class members, including Plaintiffs, were harmed by Fifth Third's using the Excess ESOP Assets to discharge Fifth Third's corporate debt. Namely, the Class members' assets were used by Fifth Third instead of being returned to the Class members.

75. The use of the Excess ESOP Assets by Fifth Third to the detriment of the Class members, including Plaintiffs, was unjust in light of the plain language of the Affiliation Agreement and the affirmative representations made by Fifth Third.

76. As a matter of equity, Fifth Third should be disgorged of the windfall it received and for which Class members were not compensated.

SEVENTH CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

77. Plaintiffs hereby incorporate paragraphs 1 through 78 as if fully set forth herein.

78. Plaintiffs, are intended beneficiaries of the Affiliation Agreement insofar as the Affiliation Agreement relates to the Suburban ESOP.

79. At the time the Affiliation Agreement was executed, representatives of Suburban, including Class members and Plaintiffs, informed Fifth Third that it was necessary for the Affiliation Agreement to ensure that all assets (or their cash equivalency) held the Suburban ESOP were the property of the Class members.

80. To this end, Section V(E) of the Affiliation Agreement purports to accomplish the purpose of ensuring that all assets (or their cash equivalency) held by the Suburban ESOP would be treated as and remain the property of the Class members.

81. On or before August 20, 1999, Fifth Third indicated that it intended to interpret Section V(E) of the Affiliation Agreement to treat the assets (and their cash equivalency) of the Suburban ESOP as belonging to Fifth Third, not the Class members.

82. By failing to adhere to the plain language of the Affiliation Agreement, Fifth Third has takes an opportunistic advantage of some perceived confusion as to the legal effect of Section V(E) in a way that was not anticipated by the parties to the Affiliation Agreement at the time of execution.

83. Fifth Third's actions in attempting to take opportunistic advantage of the Class members are done in bad faith. In particular, Fifth Third represented to certain Class members at the time the Affiliation Agreement was executed that Section V(E) purported to treat the assets (or their cash

equivalency) of the Suburban ESOP in the exact opposite manner as alleged in Fifth Third's August 20, 1999, letter.

84. As a direct and proximate result of Fifth Third's actions, Plaintiffs have suffered damages as more fully set forth below.

DAMAGES

85. As a direct and proximate result of the various actions and inactions of the Defendants and pursuant to R.C. 1343.03(A), Plaintiffs and other Class members have been damaged. In particular, Plaintiff and other Class members have been denied monies rightfully owing to them including, but not limited to:

(a) The value of the Excess ESOP Assets as of June 30, 1998, in proportion to the Class members ESOP account as of June 30, 1997;

(b) Prejudgment interest on all amounts due and owing the Class members from June 30, 1998, through the final resolution of this matter;

(c) Any and all relief this Court deems fair and just.

86. In addition, since the Defendants have engaged in intentional conduct in converting the Class members' property, Plaintiffs and other Class members are entitled to punitive damages in an amount to be determined at trial. Similarly, since the Defendants engaged in the intentional misrepresentation, Plaintiffs and other Class members are entitled to punitive damages in an amount to be determined at trial.

87. Finally, since Fifth Third breached its duties with respect to the Resulting Plan, Plaintiffs and other Class members are entitled to recover all attorney's fees expended in pursuing this action pursuant to 29 U.S.C. §1132(g)(1).

Respectfully Submitted,

/s/ Thomas R. Schoenfeld
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JURY DEMAND

Plaintiffs hereby demand a jury on all issues herein.

APPENDIX E

Relevant Language from Affiliation Agreement

V.E (1) Suburban Bancorp shall develop a written description and timetable which shall be provided to and approved by Fifth Third and its counsel, setting forth all actions necessary to: **(i)** make contributions to the Suburban Bancorp, Inc. Employee Stock Ownership Plan (ESOP) and/or to have the ESOP sell unallocated shares under the ESOP to fully repay the ESOP's existing loan, all in compliance with the applicable requirements of ERISA and the Internal Revenue Code, including Code Sections 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048) and 404; **(ii)** amend the ESOP to authorize the sale of unallocated shares to repay the loan, to provide for the allocation of gain on the sale of unallocated shares in a manner that complies with the position of the IRS in Private Letter Rulings 9648054 and 9426048 and to make such other changes as may be necessary to implement the termination; **(iii)** terminate the ESOP; and **(iv)** submit the ESOP to the Internal Revenue Service for a determination letter that the ESOP, as so amended and terminated, continues to be a qualified retirement plan and employee stock ownership plan under Sections 401 (a) and 4975 (e)(7) of the Code. Upon development and approval by Fifth Third of said written description and timetable, Suburban Bancorp shall take such actions as described therein as are approved by Fifth Third. Distribution of the shares and any other assets of the ESOP shall **(i)** not occur until after the receipt of the foregoing IRS determination letter and **(ii)** occur prior to the Effective Time only with the express written consent of Fifth Third, which shall not be unreasonably

withheld. In connection with the development of the written description and timetable referred to above and resolution of the ESOP, the parties agree they intend that, to the extent not prohibited by applicable law the ESOP shall be maintained through the date of its final termination for the exclusive benefit of individuals who had become ESOP participants on or before the Effective Time. In furtherance of this intention, such timetable and plan shall include provisions: **(a)** that Suburban Bancorp may make contributions to the ESOP for the plan year ending June 30, 1997 in the amount accrued in the ordinary course through February 28, 1997; **(b)** That Suburban may make contributions to the ESOP for the plan year ending June 30, 1997, in the amount accrued and to be accrued in the ordinary course from March 1, 1997, through June 30, 1997 but in no event greater than $42,000 and in no event may any amount be contributed that would create or increase an amount in the ESOP suspense account which, under the written description and timetable referred to above (assuming termination of the ESOP on June 30, 1998) may not be allocated within the limits of Code section 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048); **(c)** that no interest shall accrue on the existing ESOP loan after June 30, 1997; and, **(d)** that the ESOP shall terminate no later than June 30, 1998 if at that time there would be no amount in the ESOP suspense account which may not be allocated within the limits of Code section 415 (as interpreted by the IRS in Private Letter Rulings 9648054 and 9426048). If upon development of the written description and timetable referred to above, the parties agree in good faith that allocation of all or any shares of stock held in the ESOP's suspense account would violate the Code's section 415 limitations as interpreted by the IRS in Private Letter Rulings 9648054 and 6426048, Suburban Bancorp shall apply to the IRS for approval (either through an IRS determination letter or other means reasonably acceptable to Fifth Third) of a

transaction (the "Transaction") whereby the excess shares (or cash value thereof) (i.e., those shares remaining after fully utilizing the section 415 limits as interpreted by the IRS in private rulings 9648054 and 9426048) either revert to Fifth Third or are transferred to an employee benefit plan of Fifth Third. If and only if the IRS approves such a Transaction, or Fifth Third otherwise proceeds with the Transaction without IRS approval, Fifth Third will therefore pay (out of its corporate assets and not plan assets) an equivalent amount (determined using the fair market value of the transferred plan assets at the time of the transfer), reduced by expenses incurred, to individuals who were ESOP participants on the Effective Time and who shall divide such payment pro rata based on their relative ESOP account balances on June 30, 1997. The parties further agree that counsel selected by Suburban Bancorp shall be responsible, before and after the Effective Time, both for securing a determination letter from the Internal Revenue Service ("IRS") that the Suburban Bancorp ESOP, is tax-qualified for periods through its termination date and a determination letter or other acceptable IRS approval effectuating the purposes of this paragraph, all subject to the prior review and approval (which approval will not be unreasonably withheld) of Fifth Third and its counsel of the filings with the IRS and notice an opportunity to comment by Fifth Third with respect to any other actions: provided that after the Effective Time Fifth Third may remove such counsel if such counsel fails to carry out the directions of the parties in interest.

APPENDIX F

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
ADMINISTRATION AND ENFORCEMENT

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary

(A) to enjoin any act or practice which violates any provision of this title, or

(B) to obtain other appropriate equitable relief

(i) to redress such violation or

(ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)],

(A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or

(B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a

fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 [29 USCS §§ 1181 et seq.] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]). Nothing in this

paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator

(A) who fails to meet the requirements of paragraph (1) or (4) of section 606, section 101(e)(1), section 101(f), or section 105(a) [29 USCS § 1166(a)(1) or (4), 1021(e)(1), 1021(f), or 1025(a)] with respect to a participant or beneficiary, or

(B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $ 1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USCS § 1021(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 USCS § 1024(a)(4)] for failure to

provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USCS § 1021(d)] with respect to any participant or beneficiary or who fails to meet the requirements of section 101(e)(2) [29 USCS § 1021(e)(2)] with respect to any person or who fails to meet the requirements of section 302(d)(12)(E) [29 USCS § 1082(d)(12)(E)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $ 100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $ 1,000 a day for each violation by any person of section 101(j), section 302(b)(7)(F)(vi), or section 514(e)(3) [29 USCS § 1021(j), 1082(b)(7)(F)(vi), or 1144(e)(3)].

(5) The Secretary may assess a civil penalty against any person of up to $ 1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [29 USCS § 1021(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [29 USCS § 1024(a)(6)], the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $ 100 a day from the date of such failure (but in no event in excess of $ 1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $ 100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 101 [29 USCS § 1021]. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act [42 USCS § 1320b-14(c)(8)].

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan–

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part

applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USCS § 4975(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USCS §§ 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction

under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USCS § 4975].

(m) Penalty for improper distribution. In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 USCS § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $ 10,000 for each such distribution.

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE A. INCOME TAXES
CHAPTER 1. NORMAL TAXES AND SURTAXES
SUBCHAPTER D. DEFERRED COMPENSATION, ETC.
PART I. PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.
SUBPART B. SPECIAL RULES

26 U.S.C. § 415. Limitations on benefits and contributions under qualified plans.

(a) General rule.

(1) Trusts. A trust which is a part of a pension, profit-

sharing, or stock bonus plan shall not constitute a qualified trust under section 401(a) [26 USCS § 401(a)] if--

(A) in the case of a defined benefit plan, the plan provides for the payment of benefits with respect to a participant which exceed the limitation of subsection (b), or

(B) in the case of a defined contribution plan, contributions and other additions under the plan with respect to any participant for any taxable year exceed the limitation of subsection (c).

(2) Section applies to certain annuities and accounts. In the case of--

(A) an employee annuity plan described in section 403(a) [26 USCS § 403(a)],

(B) an annuity contract described in section 403(b) [26 USCS § 403(b)], or

(C) a simplified employee pension described in section 408(k) [26 USCS § 408(k)], such a contract, plan, or pension shall not be considered to be described in section 403(a), 403(b), or 408(k) [26 USCS § 403(a), 403(b), or 408(k)], as the case may be, unless it satisfies the requirements of subparagraph (A) or subparagraph (B) of paragraph (1), whichever is appropriate, and has not been disqualified under subsection (g). In the case of an annuity contract described in section 403(b) [26 USCS § 403(b)], the preceding sentence shall apply only to the portion of the annuity contract which exceeds the limitation of subsection (b) or the limitation of subsection (c), whichever is appropriate.

(b) Limitation for defined benefit plans.

(1) In general. Benefits with respect to a participant exceed the limitation of this subsection if, when expressed as an annual benefit (within the meaning of paragraph (2)), such annual benefit is greater than the lesser of--

(A) $ 160,000, or

(B) 100 percent of the participant's average compensation for his high 3 years.

(2) Annual benefit.

(A) In general. For purposes of paragraph (1), the term "annual benefit" means a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]) are made.

(B) Adjustment for certain other forms of benefit. If the benefit under the plan is payable in any form other than the form described in subparagraph (A), or if the employees contribute to the plan or make rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]), the determinations as to whether the limitation described in paragraph (1) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by adjusting such benefit so that it is equivalent to the benefit described in subparagraph (A). For purposes of this subparagraph, any ancillary benefit which is not directly related to retirement income benefits shall not be taken into account; and that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity (as defined in section 417) shall not be taken into account.

(C) Adjustment to $ 160,000 limit where benefit begins before age 62. If the retirement income benefit under the plan begins before age 62, the determination as to whether the $ 160,000 limitation set forth in paragraph (1)(A) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by reducing the limitation of paragraph (1)(A) so that such limitation (as so reduced) equals an annual benefit (beginning when such retirement income

benefit begins) which is equivalent to a $ 160,000 annual benefit beginning at age 62.

(D) Adjustment to $ 160,000 limit where benefit begins after age 65. If the retirement income benefit under the plan begins after age 65, the determination as to whether the $ 160,000 limitation set forth in paragraph (1)(A) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by increasing the limitation of paragraph (1)(A) so that such limitation (as so increased) equals an annual benefit (beginning when such retirement income benefit begins) which is equivalent to a $ 160,000 annual benefit beginning at age 65.

(E) Limitation on certain assumptions.

(i) For purposes of adjusting any limitation under subparagraph (C) and, except as provided in clause (ii), for purposes of adjusting any benefit under subparagraph (B), the interest rate assumption shall not be less than the greater of 5 percent or the rate specified in the plan.

(ii) For purposes of adjusting any benefit under subparagraph (B) for any form of benefit subject to section 417(e)(3) [26 USCS § 417(e)(3)], the interest rate assumption shall not be less than the greatest of--

(I) 5.5 percent,

(II) the rate that provides a benefit of not more than 105 percent of the benefit that would be provided if the applicable interest rate (as defined in section 417(e)(3) [26 USCS § 417(e)(3)]) were the interest rate assumption, or

(III) the rate specified under the plan.

(iii) For purposes of adjusting any limitation under subparagraph (D), the interest rate assumption shall not be greater than the lesser of 5 percent or the rate specified in the plan.

(iv) For purposes of this subsection, no adjustments under subsection (d)(1) shall be taken into account before the year for which such adjustment first takes effect.

(v) For purposes of adjusting any benefit or limitation under subparagraph (B), (C), or (D), the mortality table used shall be the table prescribed by the Secretary. Such table shall be based on the prevailing commissioners' standard table (described in section 807(d)(5)(A) [26 USCS § 807(d)(5)(A)]) used to determine reserves for group annuity contracts issued on the date the adjustment is being made (without regard to any other subparagraph of section 807(d)(5) [26 USCS § 807(d)(5)]).

(F) [Deleted]

(G) Special limitation for qualified police or firefighters. In the case of a qualified participant, subparagraph (C) of this paragraph shall not apply.

(H) Qualified participant defined. For purposes of subparagraph (G), the term "qualified participant" means a participant--

(i) in a defined benefit plan which is maintained by a State, Indian tribal government (as defined in section 7701(a)(40) [26 USCS § 7701(a)(40)]), or any political subdivision thereof,

(ii) with respect to whom the period of service taken into account in determining the amount of the benefit under such defined benefit plan includes at least 15 years of service of the participant--

(I) as a full-time employee of any police department or fire department which is organized and operated by the State, Indian tribal government (as so defined), or any political subdivision maintaining such defined benefit plan to provide police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State, Indian tribal government (as so defined), or any political subdivision, or

(II) as a member of the Armed Forces of the United States.

(I) Exemption for survivor and disability benefits provided under governmental plans. Subparagraph (C) of this paragraph and paragraph (5) shall not apply to--

(i) income received from a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) as a pension, annuity, or similar allowance as the result of the recipient becoming disabled by reason of personal injuries or sickness, or

(ii) amounts received from a governmental plan by the beneficiaries, survivors, or the estate of an employee as the result of the death of the employee.

(3) Average compensation for high 3 years. For purposes of paragraph (1), a participant's high 3 years shall be the period of consecutive calendar years (not more than 3) during which the participant had the greatest aggregate compensation from the employer. In the case of an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)], the preceding sentence shall be applied by substituting for "compensation from the employer" the following: "the participant's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)] but determined without regard to any exclusion under section 911 [26 USCS § 911])".

(4) Total annual benefits not in excess of $ 10,000. Notwithstanding the preceding provisions of this subsection, the benefits payable with respect to a participant under any defined benefit plan shall be deemed not to exceed the limitation of this subsection if--

(A) the retirement benefits payable with respect to such participant under such plan and under all other defined benefit plans of the employer do not exceed $ 10,000 for the plan year, or for any prior plan year, and

(B) the employer has not at any time maintained a defined contribution plan in which the participant participated.

(5) Reduction for participation or service of less than 10 years.

(A) Dollar limitation. In the case of an employee who has less than 10 years of participation in a defined benefit plan, the limitation referred to in paragraph (1)(A) shall be the limitation determined under such paragraph (without regard to this paragraph) multiplied by a fraction--

(i) the numerator of which is the number of years (or part thereof) of participation in the defined benefit plan of the employer, and

(ii) the denominator of which is 10.

(B) Compensation and benefits limitations. The provisions of subparagraph (A) shall apply to the limitations under paragraphs (1)(B) and (4), except that such subparagraph shall be applied with respect to years of service with an employer rather than years of participation in a plan.

(C) Limitation on reduction. In no event shall subparagraph (A) or (B) reduce the limitations referred to in paragraphs (1) and (4) to an amount less than 1/10 of such limitation (determined without regard to this paragraph).

(D) Application to changes in benefit structure. To the extent provided in regulations, subparagraph (A) shall be applied separately with respect to each change in the benefit structure of a plan.

(6) Computation of benefits and contributions. The computation of--

(A) benefits under a defined contribution plan, for purposes of section 401(a)(4) [26 USCS § 401(a)(4)],

(B) contributions made on behalf of a participant in a defined benefit plan, for purposes of section 401(a)(4) [26 USCS § 401(a)(4)], and

(C) contributions and benefits provided for a participant in a plan described in section 414(k) [26 USCS § 414(k)], for purposes of this section shall not be made on a

basis inconsistent with regulations prescribed by the Secretary.

(7) Benefits under certain collectively bargained plans. For a year, the limitation referred to in paragraph (1)(B) shall not apply to benefits with respect to a participant under a defined benefit plan (other than a multiemployer plan)--

(A) which is maintained for such year pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(B) which, at all times during such year, has at least 100 participants,

(C) under which benefits are determined solely by reference to length of service, the particular years during which service was rendered, age at retirement, and date of retirement,

(D) which provides that an employee who has at least 4 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions, and

(E) which requires, as a condition of participation in the plan, that an employee complete a period of not more than 60 consecutive days of service with the employer or employers maintaining the plan.

This paragraph shall not apply to a participant whose compensation for any 3 years during the 10-year period immediately preceding the year in which he separates from service exceeded the average compensation for such 3 years of all participants in such plan. This paragraph shall not apply to a participant for any period for which he is a participant under another plan to which this section applies which is maintained by an employer maintaining this plan. For any year for which the paragraph applies to benefits with respect to a participant, paragraph (1)(A) and subsection (d)(1)(A) shall be applied with respect to such participant by substituting one-half the amount otherwise applicable for such year under paragraph (1)(A) for "$ 160,000".

(8) Social security retirement age defined. For purposes of this subsection, the term "social security retirement age" means the age used as the retirement age under section 216(l) of the Social Security Act [42 USCS § 416(l)], except that such section shall be applied--

(A) without regard to the age increase factor, and

(B) as if the early retirement age under section 216(l)(2) of such Act [42 USCS § 416(l)(2)] were 62.

(9) Special rule for commercial airline pilots.

(A) In general. Except as provided in subparagraph (B), in the case of a participant who is a commercial airline pilot, if, as of the time of the participant's retirement, regulations prescribed by the Federal Aviation Administration require an individual to separate from service as a commercial airline pilot after attaining any age occurring on or after age 60 and before age 62, paragraph (2)(C) shall be applied by substituting such age for age 62.

(B) Individuals who separate from service before age 60. If a participant described in subparagraph (A) separates from service before age 60, the rules of paragraph (2)(C) shall apply.

(10) Special rule for State, Indian tribal, and local government plans.

(A) Limitation to equal accrued benefit. In the case of a plan maintained for its employees by any State or political subdivision thereof, or by any agency or instrumentality of the foregoing, or a governmental plan described in the last sentence of section 414(d) [26 USCS § 414(d)] (relating to plans of Indian tribal governments), the limitation with respect to a qualified participant under this subsection shall not be less than the accrued benefit of the participant under the plan (determined without regard to any amendment of the plan made after October 14, 1987).

(B) Qualified participant. For purposes of this paragraph, the term "qualified participant" means a

participant who first became a participant in the plan maintained by the employer before January 1, 1990.

(C) Election.

(i) In general. This paragraph shall not apply to any plan unless each employer maintaining the plan elects before the close of the 1st plan year beginning after December 31, 1989, to have this subsection (other than paragraph (2)(G)) [sic].

(ii) Revocation of election. An election under clause (i) may be revoked not later than the last day of the third plan year beginning after the date of the enactment of this clause [enacted Aug. 20, 1996]. The revocation shall apply to all plan years to which the election applied and to all subsequent plan years. Any amount paid by a plan in a taxable year ending after the revocation shall be includible in income in such taxable year under the rules of this chapter [26 USCS §§ 1 et seq.] in effect for such taxable year, except that, for purposes of applying the limitations imposed by this section, any portion of such amount which is attributable to any taxable year during which the election was in effect shall be treated as received in such taxable year.

(11) Special limitation rule for governmental and multiemployer plans. In the case of a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) or a multiemployer plan (as defined in section 414(f) [26 USCS § 414(f)]), subparagraph (B) of paragraph (1) shall not apply. Subparagraph (B) of paragraph (1) shall not apply to a plan maintained by an organization described in section 3121(w)(3)(A) [26 USCS § 3121(w)(3)(A)] except with respect to highly compensated benefits. For purposes of this paragraph, the term "highly compensated benefits" means any benefits accrued for an employee in any year on or after the first year in which such employee is a highly compensated employee (as defined in section 414(q) [26 USCS § 414(q)]) of the organization described in section 3121(w)(3)(A) [26

USCS § 3121(w)(3)(A)]. For purposes of applying paragraph (1)(B) to highly compensated benefits, all benefits of the employee otherwise taken into account (without regard to this paragraph) shall be taken into account.

(c) Limitation for defined contribution plans.

(1) In general. Contributions and other additions with respect to a participant exceed the limitation of this subsection if, when expressed as an annual addition (within the meaning of paragraph (2)) to the participant's account, such annual addition is greater than the lesser of--

(A) $ 40,000, or

(B) 100 percent of the participant's compensation.

(2) Annual addition. For purposes of paragraph (1), the term "annual addition" means the sum for any year of--

(A) employer contributions,

(B) the employee contributions, and

(C) forfeitures.

For the purposes of this paragraph, employee contributions under subparagraph (B) are determined without regard to any rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) [26 USCS §§ 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)]) without regard to employee contributions to a simplified employee pension which are excludable from gross income under section 408(k)(6) [26 USCS § 408(k)(6)]. Subparagraph (B) of paragraph (1) shall not apply to any contribution for medical benefits (within the meaning of section 419A(f)(2) [26 USCS § 419A(f)(2)]) after separation from service which is treated as an annual addition.

(3) Participant's compensation. For purposes of paragraph (1)--

(A) In general. The term "participant's compensation" means the compensation of the participant from the employer for the year.

(B) Special rule for self-employed individuals. In the case of an employee within the meaning of section 401(c)(1) [26 USCS § 401(c)(1)], subparagraph (A) shall be applied by substituting "the participant's earned income (within the meaning of section 401(c)(2) [26 USCS § 401(c)(2)] but determined without regard to any exclusion under section 911 [26 USCS § 911])" for "compensation of the participant from the employer".

(C) Special rules for permanent and total disability. In the case of a participant in any defined contribution plan--

(i) who is permanently and totally disabled (as defined in section 22(e)(3) [26 USCS § 22(e)(3)]),

(ii) who is not a highly compensated employee (within the meaning of section 414(q) [26 USCS § 414(q)]), and

(iii) with respect to whom the employer elects, at such time and in such manner as the Secretary may prescribe, to have this subparagraph apply, the term "participant's compensation" means the compensation the participant would have received for the year if the participant was paid at the rate of compensation paid immediately before becoming permanently and totally disabled. This subparagraph shall apply only if contributions made with respect to amounts treated as compensation under this subparagraph are nonforfeitable when made. If a defined contribution plan provides for the continuation of contributions on behalf of all participants described in clause (i) for a fixed or determinable period, this subparagraph shall be applied without regard to clauses (ii) and (iii).

(D) Certain deferrals included. The term "participant's compensation" shall include--

(i) any elective deferral (as defined in section 402(g)(3) [26 USCS § 402(g)(3)]), and

(ii) any amount which is contributed or deferred by the employer at the election of the employee and

which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), or 457 [26 USCS § 125, 132(f)(4), or 457].

(E) Annuity contracts. In the case of an annuity contract described in section 403(b) [26 USCS § 403(b)], the term "participant's compensation" means the participant's includible compensation determined under section 403(b)(3) [26 USCS § 403(b)(3)].

(4) [Deleted]

(5) Repealed.

(6) Special rule for employee stock ownership plans. If no more than one-third of the employer contributions to an employee stock ownership plan (as described in section 4975(e)(7) [26 USCS § 4975(e)(7)]) for a year which are deductible under paragraph (9) of section 404(a) [26 USCS § 404(a)] are allocated to highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]), the limitations imposed by this section shall not apply to--

(A) forfeitures of employer securities (within the meaning of section 409 [26 USCS § 409]) under such an employee stock ownership plan if such securities were acquired with the proceeds of a loan (as described in section 404(a)(9)(A) [26 USCS § 404(a)(9)(A)]), or

(B) employer contributions to such an employee stock ownership plan which are deductible under section 404(a)(9)(B) [26 USCS § 404(a)(9)(B)] and charged against the participant's account.

The amount of any qualified gratuitous transfer (as defined in section 664(g)(1) [26 USCS § 664(g)(1)]) allocated to a participant for any limitation year shall not exceed the limitations imposed by this section, but such amount shall not be taken into account in determining whether any other amount exceeds the limitations imposed by this section.

(7) Special rules relating to church plans.

(A) Alternative contribution limitation.

(i) In general. Notwithstanding any other provision of this subsection, at the election of a participant who is an employee of a church or a convention or association of churches, including an organization described in section 414(e)(3)(B)(ii) [26 USCS § 414(e)(3)(B)(ii)], contributions and other additions for an annuity contract or retirement income account described in section 403(b) [26 USCS § 403(b)] with respect to such participant, when expressed as an annual addition to such participant's account, shall be treated as not exceeding the limitation of paragraph (1) if such annual addition is not in excess of $ 10,000.

(ii) $ 40,000 aggregate limitation. The total amount of additions with respect to any participant which may be taken into account for purposes of this subparagraph for all years may not exceed $ 40,000.

(B) Number of years of service for duly ordained, commissioned, or licensed ministers or lay employees. For purposes of this paragraph--

(i) all years of service by--

(I) a duly ordained, commissioned, or licensed minister of a church, or

(II) a lay person,

as an employee of a church, a convention or association of churches, including an organization described in section 414(e)(3)(B)(ii) [26 USCS § 414(e)(3)(B)(ii)], shall be considered as years of service for 1 employer, and

(ii) all amounts contributed for annuity contracts by each such church (or convention or association of churches) or such organization during such years for such minister or lay person shall be considered to have been contributed by 1 employer.

(C) Foreign missionaries. In the case of any individual described in subparagraph (B) performing services outside the United States, contributions and other additions for an annuity contract or retirement income account described in

section 403(b) [26 USCS § 403(b)] with respect to such employee, when expressed as an annual addition to such employee's account, shall not be treated as exceeding the limitation of paragraph (1) if such annual addition is not in excess of $ 3,000. This subparagraph shall not apply with respect to any taxable year to any individual whose adjusted gross income for such taxable year (determined separately and without regard to community property laws) exceeds $ 17,000.

(D) Annual addition. For purposes of this paragraph, the term "annual addition" has the meaning given such term by paragraph (2).

(E) Church, convention or association of churches. For purposes of this paragraph, the terms "church" and "convention or association of churches" have the same meaning as when used in section 414(e) [26 USCS § 414(e)].

(d) Cost-of-living adjustments.

(1) In general. The Secretary shall adjust annually--

(A) the $ 160,000 amount in subsection (b)(1)(A),

(B) in the case of a participant who separated from service, the amount taken into account under subsection (b)(1)(B), and

(C) the $ 40,000 amount in subsection (c)(1)(A), for increases in the cost-of-living in accordance with regulations prescribed by the Secretary.

(2) Method. The regulations prescribed under paragraph (1) shall provide for--

(A) an adjustment with respect to any calendar year based on the increase in the applicable index for the calendar quarter ending September 30 of the preceding calendar year over such index for the base period, and

(B) adjustment procedures which are similar to the procedures used to adjust benefit amounts under section 215(i)(2)(A) of the Social Security Act [42 USCS § 415(i)(2)(A)].

(3) Base period. For purposes of paragraph (2)--

(A) $ 160,000 amount. The base period taken into account for purposes of paragraph (1)(A) is the calendar quarter beginning July 1, 2001.

(B) Separations after December 31, 1994. The base period taken into account for purposes of paragraph (1)(B) with respect to individuals separating from service with the employer after December 31, 1994, is the calendar quarter beginning July 1 of the calendar year preceding the calendar year in which such separation occurs.

(C) Separations before January 1, 1995. The base period taken into account for purposes of paragraph (1)(B) with respect to individuals separating from service with the employer before January 1, 1995, is the calendar quarter beginning October 1 of the calendar year preceding the calendar year in which such separation occurs.

(D) $ 40,000 amount. The base period taken into account for purposes of paragraph (1)(C) is the calendar quarter beginning July 1, 2001.

(4) Rounding.

(A) $ 160,000 amount. Any increase under subparagraph (A) of paragraph (1) which is not a multiple of $ 5,000 shall be rounded to the next lowest multiple of $5,000. This subparagraph shall also apply for purposes of any provision of this title that provides for adjustments in accordance with the method contained in this subsection, except to the extent provided in such provision.

(B) $ 40,000 amount. Any increase under subparagraph (C) of paragraph (1) which is not a multiple of $ 1,000 shall be rounded to the next lowest multiple of $1,000.

(e) [Repealed]

(f) Combining of plans.

(1) In general. For purposes of applying the limitations

of subsections (b) and (c)--

(A) all defined benefit plans (whether or not terminated) of an employer are to be treated as one defined benefit plan, and

(B) all defined contribution plans (whether or not terminated) of an employer are to be treated as one defined contribution plan.

(2) Annual compensation taken into account for defined benefit plans. If the employer has more than one defined benefit plan--

(A) subsection (b)(1)(B) shall be applied separately with respect to each such plan, but

(B) in applying subsection (b)(1)(B) to the aggregate of such defined benefit plans for purposes of this subsection, the high 3 years of compensation taken into account shall be the period of consecutive calendar years (not more than 3) during which the individual had the greatest aggregate compensation from the employer.

(3) Exception for multiemployer plans. Notwithstanding paragraph (1) and subsection (g), a multiemployer plan (as defined in section 414(f)) shall not be combined or aggregated--

(A) with any other plan which is not a multiemployer plan for purposes of applying subsection (b)(1)(B) to such other plan, or

(B) with any other multiemployer plan for purposes of applying the limitations established in this section.

(g) Aggregation of plans. Except as provided in subsection (f)(3), the Secretary, in applying the provisions of this section to benefits or contributions under more than one plan maintained by the same employer, and to any trusts, contracts, accounts, or bonds referred to in subsection (a)(2), with respect to which the participant has the control required under section 414(b) or (c), as modified by subsection (h), shall,

under regulations prescribed by the Secretary, disqualify one or more trusts, plans, contracts, accounts, or bonds, or any combination thereof until such benefits or contributions do not exceed the limitations contained in this section. In addition to taking into account such other factors as may be necessary to carry out the purposes of subsection (f), the regulations prescribed under this paragraph shall provide that no plan which has been terminated shall be disqualified until all other trusts, plans, contracts, accounts, or bonds have been disqualified.

(h) 50 percent control. For purposes of applying subsections (b) and (c) of section 414 [26 USCS § 414] to this section, the phrase "more than 50 percent" shall be substituted for the phrase "at least 80 percent" each place it appears in section 1563(a)(1) [26 USCS § 1563(a)(1)].

(i) Records not available for past periods. Where for the period before January 1, 1976, or (if later) the first day of the first plan year of the plan, the records necessary for the application of this section are not available, the Secretary may by regulations prescribe alternative methods for determining the amounts to be taken into account for such period.

(j) Regulations; definition of year. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section, including, but not limited to, regulations defining the term "year" for purposes of any provision of this section.

(k) Special rules.

(1) Defined benefit plan and defined contribution plan. For purposes of this title, the term "defined contribution plan" or "defined benefit plan" means a defined contribution plan (within the meaning of section 414(i) [26 USCS § 414(i)]) or a defined benefit plan (within the meaning of section 414(j)

[26 USCS § (j)]), whichever applies, which is--

(A) a plan described in section 401(a) [26 USCS § 401(a)] which includes a trust which is exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) an annuity plan described in section 403(a) [26 USCS § 403(a)],

(C) an annuity contract described in section 403(b) [26 USCS § 403(b)], or

(D) a simplified employee pension.

(2) Contributions to provide cost-of-living protection under defined benefit plans.

(A) In general. In the case of a defined benefit plan which maintains a qualified cost-of-living arrangement--

(i) any contribution made directly by an employee under such an arrangement shall not be treated as an annual addition for purposes of subsection (c), and

(ii) any benefit under such arrangement which is allocable to an employer contribution which was transferred from a defined contribution plan and to which the requirements of subsection (c) were applied shall, for purposes of subsection (b), be treated as a benefit derived from an employee contribution (and subsection (c) shall not again apply to such contribution by reason of such transfer).

(B) Qualified cost-of-living arrangement defined. For purposes of this paragraph, the term "qualified cost-of-living arrangement" means an arrangement under a defined benefit plan which--

(i) provides a cost-of-living adjustment to a benefit provided under such plan or a separate plan subject to the requirements of section 412, and

(ii) meets the requirements of subparagraphs (C), (D), (E), and (F) and such other requirements as the Secretary may prescribe.

(C) Determination of amount of benefit. An arrangement meets the requirement of this subparagraph only

if the cost-of-living adjustment of participants is based--

(i) on increases in the cost-of-living after the annuity starting date, and

(ii) on average cost-of-living increases determined by reference to 1 or more indexes prescribed by the Secretary, except that the arrangement may provide that the increase for any year will not be less than 3 percent of the retirement benefit (determined without regard to such increase).

(D) Arrangement elective; time for election. An arrangement meets the requirements of this subparagraph only if it is elective, it is available under the same terms to all participants, and it provides that such election may at least be made in the year in which the participant--

(i) attains the earliest retirement age under the defined benefit plan (determined without regard to any requirement of separation from service), or

(ii) separates from service.

(E) Nondiscrimination requirements. An arrangement shall not meet the requirements of this subparagraph if the Secretary finds that a pattern of discrimination exists with respect to participation.

(F) Special rules for key employees.

(i) In general. An arrangement shall not meet the requirements of this paragraph if any key employee is eligible to participate.

(ii) Key employee. For purposes of this subparagraph, the term "key employee" has the meaning given such term by section 416(i)(1) [26 USCS § 416(i)(1)], except that in the case of a plan other than a top-heavy plan (within the meaning of section 416(g) [26 USCS § 416(g)]), such term shall not include an individual who is a key employee solely by reason of section 416(i)(1)(A)(i) [26 USCS § 416(i)(1)(A)(i)].

(3) Repayments of cashouts under governmental plans. In the case of any repayment of contributions (including interest thereon) to the governmental plan with respect to an amount previously refunded upon a forfeiture of service credit under the plan or under another governmental plan maintained by a State or local government employer within the same State, any such repayment shall not be taken into account for purposes of this section.

(4) Special rules for sections 403(b) and 408. For purposes of this section, any annuity contract described in section 403(b) [26 USCS § 403(b)] for the benefit of a participant shall be treated as a defined contribution plan maintained by each employer with respect to which the participant has the control required under subsection (b) or (c) of section 414 [26 USCS § 414] (as modified by subsection (h)). For purposes of this section, any contribution by an employer to a simplified employee pension plan for an individual for a taxable year shall be treated as an employer contribution to a defined contribution plan for such individual for such year.

(l) Treatment of certain medical benefits.

(1) In general. For purposes of this section, contributions allocated to any individual medical benefit account which is part of a pension or annuity plan shall be treated as an annual addition to a defined contribution plan for purposes of subsection (c). Subparagraph (B) of subsection (c)(1) shall not apply to any amount treated as an annual addition under the preceding sentence.

(2) Individual medical benefit account. For purposes of paragraph (1), the term "individual medical benefit account" means any separate account--

(A) which is established for a participant under a pension or annuity plan, and

(B) from which benefits described in section 401(h) [26 USCS § 401(h)] are payable solely to such participant, his spouse, or his dependents.

(m) Treatment of qualified governmental excess benefit arrangements.

(1) Governmental plan not affected. In determining whether a governmental plan (as defined in section 414(d) [26 USCS § 414(d)]) meets the requirements of this section, benefits provided under a qualified governmental excess benefit arrangement shall not be taken into account. Income accruing to a governmental plan (or to a trust that is maintained solely for the purpose of providing benefits under a qualified governmental excess benefit arrangement) in respect of a qualified governmental excess benefit arrangement shall constitute income derived from the exercise of an essential governmental function upon which such governmental plan (or trust) shall be exempt from tax under section 115 [26 USCS § 115].

(2) Taxation of participant. For purposes of this chapter [26 USCS §§ 1 et seq.]--

(A) the taxable year or years for which amounts in respect of a qualified governmental excess benefit arrangement are includible in gross income by a participant, and

(B) the treatment of such amounts when so includible by the participant, shall be determined as if such qualified governmental excess benefit arrangement were treated as a plan for the deferral of compensation which is maintained by a corporation not exempt from tax under this chapter [26 USCS §§ 1 et seq.] and which does not meet the requirements for qualification under section 401 [26 USCS § 401].

(3) Qualified governmental excess benefit arrangement. For purposes of this subsection, the term "qualified governmental excess benefit arrangement" means

a portion of a governmental plan if--

(A) such portion is maintained solely for the purpose of providing to participants in the plan that part of the participant's annual benefit otherwise payable under the terms of the plan that exceeds the limitations on benefits imposed by this section,

(B) under such portion no election is provided at any time to the participant (directly or indirectly) to defer compensation, and

(C) benefits described in subparagraph (A) are not paid from a trust forming a part of such governmental plan unless such trust is maintained solely for the purpose of providing such benefits.

(n) Special rules relating to purchase of permissive service credit.

(1) In general. If a participant makes 1 or more contributions to a defined benefit governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]) to purchase permissive service credit under such plan, then the requirements of this section shall be treated as met only if--

(A) the requirements of subsection (b) are met, determined by treating the accrued benefit derived from all such contributions as an annual benefit for purposes of subsection (b), or

(B) the requirements of subsection (c) are met, determined by treating all such contributions as annual additions for purposes of subsection (c).

(2) Application of limit. For purposes of--

(A) applying paragraph (1)(A), the plan shall not fail to meet the reduced limit under subsection (b)(2)(C) solely by reason of this subsection, and

(B) applying paragraph (1)(B), the plan shall not fail to meet the percentage limitation under subsection (c)(1)(B) solely by reason of this subsection.

(3) Permissive service credit. For purposes of this subsection--

(A) In general. The term "permissive service credit" means service credit--

(i) recognized by the governmental plan for purposes of calculating a participant's benefit under the plan,

(ii) which such participant has not received under such governmental plan, and

(iii) which such participant may receive only by making a voluntary additional contribution, in an amount determined under such governmental plan, which does not exceed the amount necessary to fund the benefit attributable to such service credit. Such term may include service credit for periods for which there is no performance of service, and, notwithstanding clause (ii), may include service credited in order to provide an increased benefit for service credit which a participant is receiving under the plan.

(B) Limitation on nonqualified service credit. A plan shall fail to meet the requirements of this section if--

(i) more than 5 years of nonqualified service credit are taken into account for purposes of this subsection, or

(ii) any nonqualified service credit is taken into account under this subsection before the employee has at least 5 years of participation under the plan.

(C) Nonqualified service credit. For purposes of subparagraph (B), the term "nonqualified service credit" means permissive service credit other than that allowed with respect to--

(i) service (including parental, medical, sabbatical, and similar leave) as an employee of the Government of the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing (other than military service or service for

credit which was obtained as a result of a repayment described in subsection (k)(3)),

(ii) service (including parental, medical, sabbatical, and similar leave) as an employee (other than as an employee described in clause (i)) of an educational organization described in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)] which is a public, private, or sectarian school which provides elementary or secondary education (through grade 12), or a comparable level of education, as determined under the applicable law of the jurisdiction in which the service was performed,

(iii) service as an employee of an association of employees who are described in clause (i), or

(iv) military service (other than qualified military service under section 414(u) [26 USCS § 414(u)]) recognized by such governmental plan.

In the case of service described in clause (i), (ii), or (iii), such service will be nonqualified service if recognition of such service would cause a participant to receive a retirement benefit for the same service under more than one plan.

(D) Special rules for trustee-to-trustee transfers. In the case of a trustee-to-trustee transfer to which section 403(b)(13)(A) or 457(e)(17)(A) [26 USCS § 403(b)(13)(A) or 457(e)(17)(A)] applies (without regard to whether the transfer is made between plans maintained by the same employer)--

(i) the limitations of subparagraph (B) shall not apply in determining whether the transfer is for the purchase of permissive service credit, and

(ii) the distribution rules applicable under this title to the defined benefit governmental plan to which any amounts are so transferred shall apply to such amounts and any benefits attributable to such amounts.

TITLE 26 -- INTERNAL REVENUE
CHAPTER I -- INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
SUBCHAPTER D -- MISCELLANEOUS EXCISE TAXES PART 54 -- PENSION EXCISE TAXES

26 C.F.R. § 54.4975-7

Other statutory exemptions.

(a) [Reserved]

(b) Loans to employee stock ownership plans--

(8) Release from encumbrance-

(iv) Illustration. The general rule under paragraph (b)(8)(i) of this section operates as illustrated in the following example:

Example. Corporation X establishes an ESOP that borrows $ 750,000 from a bank. X guarantees the loan, which is for 15 years at 5% interest and is payable in level annual amounts of $ 72,256.72. Total payments on the loan are $ 1,083,850.80. The ESOP uses the entire loan proceeds to acquire 15,000 shares of X stock which is used as collateral for the loan. The number of securities to be released for the first year is 1,000 shares, i.e., 15,000 shares X $ 72,256.72/$ 1,083,850.80 = 15,000 shares X 1/15. The number of securities to be released for the second year is 1,000 shares, i.e., 14,000 shares X $ 72,256.72/$ 1,011,594.08 = 14,000 shares X 1/14. If all loan payments are made as originally scheduled, the number of securities released in each succeeding year of the loan will also be 1,000.